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NOT TO BE PUBLISHED OPINION

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RENDERED: JUNE 13, 2019
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 7/5/19 Kim Redman, DC

2018-SC-000652-MR

AUTUMN CASTILLO — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2018-CA-000875
JEFFERSON CIRCUIT COURT NO. 09-CI-504470

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

AND

SCOTT CASTILLO — REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is an appeal of the Court of Appeals' denial of Autumn Castillo's petition for a writ of mandamus. The underlying case is a divorce action within which the Appellee and Real Party in Interest, Scott Castillo, sought to be named the "primary residential parent" to A.C.[1], the parties' minor son. The Appellant, Autumn Castillo, asked for an order requiring that A.C. be

[1] Initials are used to help protect the anonymity of the minor child in this case.

immediately returned to her. She claims that A.C. "was taken from her unlawfully and absent process." We affirm the Court of Appeals.

I. BACKGROUND

Autumn Castillo and Scott Castillo were divorced in 2010. They have two minor children, a son and a daughter. Their son, A.C., is the child whose placement is being contested in this matter. At the time of their divorce, the parties were granted joint custody of the children, with Autumn Castillo being the children's primary residence for school. Scott was granted parenting time every other weekend, and the parties would share or alternate on holidays. Eventually, Autumn and Scott's daughter began to live with Scott, while A.C. continued to live with Autumn. Scott continued to exercise his parenting time with A.C., including substantial time during the summers. Autumn's visitation with her daughter is not at issue in this case.

On November 6, 2017, Scott filed a motion in the Jefferson County Family Court with an affidavit and proposed order attached. In the affidavit, Scott made several allegations of misconduct by Autumn and her boyfriend Daniel, including physical abuse perpetrated by Daniel on A.C. and the presence of marijuana in Autumn's home. To this motion, he also attached an "after visit summary" from Norton Healthcare and a "prevention plan" from the Cabinet for Health and Family Services. In the affidavit, Scott asks the Family Court to both give him "temporary custody" of A.C. and to grant him "primary residential custody" of A.C. The proposed order, however, uses the term "primary residential parent."

The motion came before the Family Court, Judge Hugh Smith Haynie, on November 13, 2017. Three separate written orders were entered that day, each appointing Rexena Napier as Friend of the Court (FOC). Ms. Napier was ordered to "perform an investigation and make a report and recommendations concerning custody, parenting time, and/or visitation of the parties' minor child." Judge Haynie also ordered that the "[p]arties must follow temporary recommendations of FOC" (emphasis in original). The case was continued to November 27, 2017. Between November 13, 2017, and November 27, 2017, emails were exchanged between Ms. Napier and counsel for the parties. Ms. Napier made various recommendations, including a recommendation that Autumn have six (6) hours of parenting time with A.C. on the weekends and that both children enroll in therapy. None of these emails, nor any written memorialization of Ms. Napier's findings and recommendations, were made a part of the Family Court record at this point.

What occurred at the hearing on November 27, 2017, is disputed by the parties.[2] Judge Haynie asserts that Autumn's counsel at the time, Christine Tobin, agreed to continue to abide by the FOC's recommendations and to attend mediation. Autumn's current counsel, Kirk Hoskins, denies that Ms. Tobin ever agreed to these things, and that by ordering the parties to continue to abide by the FOC recommendations, Judge Haynie unconstitutionally delegated his adjudicative power to the FOC. This is Autumn's main argument

[2] This is a writ action. As such, this Court does not have the benefit of the full record. Nor did the Appellees file a Reply brief. The facts described in this opinion are based on what can be gleaned from the Appellant's brief and the limited record.

throughout her writ petition. No written order was entered after this hearing date.

Mediation was held in the case on February 9, 2018, but an agreement was not reached. On March 5, 2018, Autumn filed a motion to vacate the Family Court's previous orders and to return A.C. to her. This motion was called at the Family Court's March 19, 2018, hearing docket. At that hearing, Judge Haynie indicated that Ms. Napier had filed a report, and the parties acknowledged that they had received it. A copy of this report was not included in the appellate record provided to this Court. Judge Haynie stated that he would enter a written order reflecting the parties' agreement from the November 27, 2017, hearing and confirming a three (3) hour hearing scheduled for June 1. On March 22, 2018, Judge Haynie issued two orders, one of which passed the case to the hearing scheduled for June 1, 2018, and a second which ordered, by agreement, the parenting time and therapy to which the parties agreed at the November 27, 2017 hearing. This second order was designated Nunc Pro Tunc and made effective November 27, 2017.

On April 2, 2018, Autumn filed a renewed motion to vacate the Family Court's previous orders and to return A.C. to her. Attached to this motion was a purported transcript of the previous hearings in the case. The FOC also filed a motion to compel payment from Autumn. The case was heard on the Family Court's April 9, 2018 motion docket. A recording of this hearing was not provided to this Court, and it does not appear that any orders were issued.

A pre-hearing conference was held on May 10, 2018. At the beginning of the hearing, Judge Haynie distributed two orders to the parties. Both orders had been entered earlier that day. The first ordered Autumn to immediately pay Ms. Napier the outstanding balance owed. The second order denied Autumn's motion to vacate. The hearing then proceeded for over an hour and was incredibly contentious. Judge Haynie, in both his orders and the hearing held on May 10, 2018, expressed serious concerns with Autumn's counsel's representations to the court, including the content of the transcripts attached to his April 2, 2018, motion. Despite this, the court confirmed the hearing date of June 1, 2018.

On May 15, 2018, Judge Haynie issued a Sua Sponte Order of Recusal and Reassignment. The stated basis for recusal was Judge Haynie's filing of an ethics complaint with the Kentucky Bar Association (KBA) against Autumn's counsel. The order stated that this complaint was made after consultation and advice from both the KBA Ethics Commission and his local KBA ethics hotline on May 11, 2018. The June 1, 2018, hearing date was remanded and the case was remanded to the Chief Judge to be reassigned. The parties were ordered to abide by all existing court orders.

On June 12, 2018, Autumn filed a petition for writ of mandamus in the Court of Appeals. The Court of Appeals denied the petition, and Autumn appealed to this Court.

II. ANALYSIS

A writ of mandamus is an extraordinary remedy. Writs may be granted in two classes of cases. The first class requires a showing that "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." *Hoskins v. Maricle,* 150 S.W.3d 1, 10 (Ky. 2004). The second class requires a showing 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." *Id.* This second class also usually requires a showing that "great injustice and irreparable injury will result if the petition is not granted." *Id.* There are, however, special cases within the second class of writs 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. "No adequate remedy by appeal" means that Appellant's injury "could not thereafter be rectified in subsequent proceedings in the case." *Id.* at 615. This Court reviews appeals from the denials of writs based on questions of law *de novo. Shafizadeh v. Bowles,* 366 S.W.3d 373 (Ky. 2011).

A. First Class of Writs

Appellant argues that the Family Court acted outside of its jurisdiction in three ways: (1) by unconstitutionally delegating judicial authority to the FOC; (2) by issuing substantive orders immediately prior to recusal; and (3) by effectively vacating the September 30, 2010, custody agreement without a hearing.

In *Lee v. George*, this Court discussed jurisdiction in the context of extraordinary writs when we said:

> '[J]urisdiction' refers not to mere legal errors but to subject-matter jurisdiction, *e.g., Goldstein v. Feeley,* 299 S.W.3d 549 (Ky. 2009), which goes to the court's core authority to even hear cases. *See, e.g., Petrey v. Cain,* 987 S.W.2d 786, 788 (Ky. 1999) (defining subject-matter jurisdiction as "a court's authority to determine 'this kind of case' as opposed to 'this case' " (quoting *Duncan v. O'Nan,* 451 S.W.2d 626, 631 (Ky.1970))).

369 S.W.3d 29, 33 (Ky. 2012).

As in *Lee*, the Family Court here clearly has jurisdiction to hear divorce cases and to issue orders within those divorce cases, including orders relating to primary residence, timesharing, and visitation. All of the Appellant's arguments are essentially that the Family Court acted contrary to law, not that it actually acted outside of its jurisdiction. "Such an understanding of jurisdiction would effectively gut our procedures for appellate review because, under such an approach, the lower court would be proceeding outside its jurisdiction *every time* it made an erroneous decision, and so an extraordinary writ would be available for every alleged error." *Id.*

Within the first class of writs, the Appellant's first argument is that the Family Court acted outside its jurisdiction by unconstitutionally delegating judicial authority to the FOC. The Family Court clearly has jurisdiction to appoint an FOC under both Kentucky Family Court Rules of Practice and Procedure (FCRPP) 6(2)(f) and Kentucky Revised Statutes (KRS) 403.090(4). FCRPP 6(2)(f) states that "the court may order[,] one or more of the following, which may be apportioned at the expense of the parents or custodians: (f) Appointment of a friend of the court or *de facto* friend of the court." KRS 403.090(4) states,

> In any action for divorce where the parties have minor children, the friend of the court, if requested by the trial judge, shall make such investigation as will enable the friend of the court to ascertain all facts and circumstances that will affect the rights and interests of the children and will enable the court to enter just and proper orders and judgment concerning the care, custody, and maintenance of the children. The friend of the court shall make a report to the trial judge, at a time fixed by the judge, setting forth recommendations as to the care, custody, and maintenance of the children. The friend of the court may request the court to postpone the final submission of any case to give the friend of the court a reasonable time in which to complete the investigation.

This authority was previously acknowledged by this Court when we stated,

> [C]ourts addressing custody and visitation disputes have broad rule and statutory authority to obtain the assistance of various professionals to help them understand the custodial situation and to make a determination as to the child or children's best interest. That authority includes the ability to appoint an attorney as a *de facto* friend of the court to investigate the circumstances on the court's behalf, to file a report summarizing his or her findings, and to make custodial recommendations.

Morgan v. Getter, 441 S.W.3d 94, 118 (Ky. 2014).

If, as Appellant alleges, the Family Court unconstitutionally delegated judicial authority to the FOC, this would be an error, but would not be an act outside of the Family Court's jurisdiction. Therefore, Appellant's first argument that the Family Court acted outside its jurisdiction by unconstitutionally delegating judicial authority to the FOC fails.

Appellant's next argument is that the Family Court acted outside its jurisdiction by issuing substantive orders immediately prior to recusal. To support this argument, Appellant states that Judge Haynie was aware of his need to recuse himself but delayed his recusal until after he entered the May 10, 2018, orders. Appellant incorrectly argues that Judge Haynie was required to recuse himself because he not only had "a personal bias or prejudice concerning a party" but also had "personal knowledge of disputed evidentiary facts concerning the proceedings." Judge Haynie's recusal, however, was not required and was based on his feeling uncomfortable presiding over a case after he had made an ethics complaint to the KBA against one of the attorneys in the case.

Appellant relies on *Appalachian Regional Healthcare, Inc. v. Coleman*'s statement that after a judge recuses himself, his authority "is limited to the power to 'perform mere formal and ministerial acts but nothing more.'" 239 S.W.3d 49, 54 (Ky. 2007) (quoting *Dotson v. Burchett,* 190 S.W.2d 697, 698 (Ky. 1945)). Appellant's reliance is misplaced, as Judge Haynie had not yet recused himself at the time he issued the May 10, 2018, orders.

Appellant further argues that the Family Court lacked jurisdiction because Judge Haynie *should have* recused himself prior to issuing the May 10, 2018, orders. This argument runs afoul of *Appalachian Regional Healthcare, Inc.* where this Court stated, "It is a kind of jurisdiction that may be accepted by a party by the failure to raise objection seasonably. That, it may be said, is based upon the principle of waiver or estoppel." *Id.* (quoting *Dotson*, 190 S.W.2d at 698). Appellant did not object to Judge Haynie's presiding over the case at the May 10, 2018 hearing, or anytime before the issuance of the recusal order. Therefore, even if Judge Haynie should have recused himself, Autumn waived this jurisdictional issue by failing to object. Appellant's second argument fails.

Appellant's final argument within the first class of writ cases is that the Family Court acted outside its jurisdiction by effectively vacating the September 30, 2010, custody agreement without a hearing. To begin, we reiterate the difference between modification of custody and modification of timesharing or visitation.

> [A] modification of custody means more than who has physical possession of the child. Custody is either sole or joint (or the subsets of each) and to modify it is to change it from one to the other. On the other hand, changing how much time a child spends with each parent does not change the legal nature of the custody ordered in the decree. This is true whether the parent has sole or joint custody: decision-making is either vested in one parent or in both, and how often the child's physical residence changes or the amount of time spent with each parent does not change this.

Pennington v. Marcum, 266 S.W.3d 759, 767 (Ky. 2008), *as modified* (Oct. 24, 2008).

In this case, despite the words used in his affidavit, Scott sought to change A.C.'s physical residence, not to modify the custody of A.C. from joint to sole. Therefore, KRS 403.350's jurisdictional requirements for the Family Court to hear a motion to change custody are not applicable.

Appellant argues that even if Scott's motion was merely for a change in primary residence, KRS 403.320 still required a hearing. Assuming, arguendo, that the Family Court erred in not holding a proper hearing during the pendency of this case, this would be an error within the Family Court's jurisdiction. The hearing is a procedural requirement, not a jurisdictional requirement. Therefore, the Appellant's argument that the Family Court acted outside its jurisdiction by effectively vacating the September 30, 2010, custody agreement without a hearing fails.

B. Second Class of Writs

Appellant's final argument is that the Family Court acted erroneously within its jurisdiction by concluding Autumn agreed to cede judicial power to the FOC. To succeed in a petition for a writ of the second class, the appellant must show that there is no adequate remedy by appeal. "Lack of an adequate remedy by appeal is an absolute prerequisite to the issuance of a writ under this second category." *Independent Order of Foresters,* 175 S.W.3d at 615 (citing *Bender*, 343 S.W.2d at 801). This is true even of the "special cases" type of writs. *Id.* at 617. Because it is a prerequisite and is dispositive in this case, we will address the Appellant's availability of a remedy by appeal first.

Here, Appellant's claimed injury is that she has been "stripped of any meaningful relationship with her nine year old son." This claimed injury is substantially similar to that claimed in *Lee*. In *Lee*, the Appellant's claimed injury was that he did not have custody of his children and that his visitation time with them was less than he deserved. 369 S.W.3d at 34. In essence, Autumn makes the same argument to this Court. As in *Lee*, this is not different than every other visitation case in which a parent does not get as much visitation or timesharing as he or she desires. Appellant's "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." *Id.* Therefore, this Court does not reach the merits of Appellant's final claim for issuance of a writ of mandamus.

III. CONCLUSION

For the reasons stated above, we affirm the Court of Appeals' denial of Autumn Castillo's petition for a writ of mandamus.

All sitting. All concur.

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