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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: OCTOBER 31, 2019
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2019-SC-000093-MR

JERRY W. WELLS — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2018-CA-001467-OA
WARREN FAMILY COURT NO. 14-CI-00479

HON. CATHERINE HOLDERFIELD, JUDGE,
WARREN FAMILY COURT, DIV. IV, — APPELLEES

AND

ROBBIE NELSON,
ROBERT ANDREW SHARP, JR.,
HEATHER ANNE GREENE SHARP,
A.K.S, A MINOR CHILD AND
R.A.S. III, A MINOR CHILD — REAL PARTIES IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal from the denial of a writ of mandamus stems from a Warren Family Court child custody action involving A.K.S. and R.A.S., III., the minor children of Robert Andrew Sharp, Jr. and Heather Anne Greene Sharp. Jerry Wells is married to Robbin Nelson, the paternal grandmother of the children, but was not a party to the action below. In May 2014, Robert and Heather Sharp, while still married[1], entered into an agreed order that permanent *de facto* custody of their children be placed with Nelson.

[1] Robert and Heather later divorced.

In 2015, Heather filed motions seeking to modify custody and set visitation. The family court established a visitation schedule for the parents at that time. Citing medical and educational reasons, Nelson sought and was granted permission, over Heather's objection, to move with the minor children to Nashville, Tennessee.

Approximately six months later, Nelson and Wells both filed a petition to adopt the children in Tennessee. In April 2016, before the adoption proceedings could be finalized, Heather filed a motion for contempt in Warren Family Court against Nelson for her failure to allow visitation. The Warren Family Court entered an order asserting continuing, exclusive jurisdiction over the child custody issues in accordance with the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA).[2]

Around September 2016, Heather filed a motion to modify custody in the Warren Family Court. The Tennessee court stayed the adoption proceedings pending the outcome of the Kentucky custody determination. In July 2017, the Warren Family Court granted temporary custody to Heather. On November 28, 2017, the family court granted a motion filed by Heather and entered an order which prohibited contact between the minor children and Nelson.

A final custody hearing was scheduled in Warren Family Court for October 12, 2018. It was not until September 20, 2018 that Wells filed a

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[2] UCCJEA § 202(a). The UCCJEA is a codified uniform state law drafted by the National Conference of Commissioners on Uniform State Laws for the purpose of determining which state has jurisdiction to decide custody decisions. Kentucky adopted the UCCJEA through Kentucky Revised Statutes (KRS) 403.800 to 403.880.

motion, without an accompanying petition, seeking to intervene in the custody action. Wells asserted he should have been named as a *de facto* custodian along with his wife, Nelson, and therefore should be a party to the action.

On October 8, 2018, Wells filed a *pro se* petition for a writ of mandamus with the Court of Appeals and requested immediate relief of the family court's ruling. The Court of Appeals denied the request for emergency relief on October 8, 2018. The next day, Judge Holderfield entered an order denying his motion to intervene and set a final hearing on the modification of custody. It does not appear from an online review of CourtNet[3] that Wells filed a motion to alter, amend or vacate the order denying his motion to intervene, nor does it appear that he filed a notice of appeal. Wells filed a motion for reconsideration in the writ action, and it was denied on October 12, 2018. While the writ action was still pending before the Court of Appeals, Judge Holderfield entered findings of fact and conclusions of law on December 20, 2018.[4] On January 9, 2019, the assigned Court of Appeals panel entered an order denying the extraordinary writ. In its order, the Court of Appeals declined to address several of Wells' claims, including his request to disqualify Judge Holderfield from presiding over the case, a request he also argues before this Court. We

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[3] CourtNet is an online search tool used to find civil and criminal cases. CourtNet is not an Official record. It offers detailed case information from the proceedings of each individual case.

[4] Information gleaned from CourtNet step sheet of underlying custody action. It is unclear from the record if this was a final judgment or not. However, a review of the Court of Appeals dockets show that Robbin Nelson has filed an appeal, (*Robbin Nelson v. Heather Anne Sharp, et al*) with an associated Circuit case listed as Warren Family Court, Judge Holderfield, 14-CI-00479.

agree with the Court of Appeals that as a non-party without standing or a stake in the family court proceedings, Wells did not have standing to seek disqualification of the judge. Wells timely sought review regarding the writ of mandamus in this Court.

Wells argues for granting his writ of prohibition, claiming that the Warren Family Court is acting outside of its jurisdiction and there is no remedy through an intermediate court. There are two classes of extraordinary writs available to litigants.[5] The first class of writs applies when a lower court is acting outside of its subject matter jurisdiction and there is no adequate remedy through application to an intermediate court.[6]

Wells claims that the family court lost subject matter jurisdiction after the children lived in Tennessee for six (6) months, arguing that Tennessee became the children's home state pursuant to the UCCJEA. However, even though Nelson, Wells and the children moved to Tennessee, Kentucky could and did retain exclusive, continuing jurisdiction over the child custody and visitations matters. When the action commenced in May 2014, all parties were Kentucky residents, Kentucky entered the initial child custody determination, and Heather maintained her residency and exercised parenting time with the children in Kentucky throughout. Pursuant to KRS § 402.824,

> (1) [A] court of this state which has made a child custody determination consistent with KRS 403.822 or 403.826 has exclusive, continuing jurisdiction over the determination until: (a) A court of this state determines

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[5] *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004).

[6] *Id.*

> that neither the child, nor the child and one parent, nor the child and a person acting as a parent have significant connections with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationship[.]

Wells argues that Kentucky lost jurisdiction to Tennessee, noting that adoption proceedings had been initiated in Tennessee. However, *Williams v. Bittel*[7] held that even a final Georgia adoption decree did not divest Kentucky of its jurisdiction in a child custody matter. The court in *Bittel* opined "Our reading of both the UCCJEA and PKPA[8] persuades us that exclusive, continuous jurisdiction of the custody matters remains in Kentucky as long as Bittel resides in Kentucky and maintains a significant relationship with M.K. (internal citation omitted)."[9] Therefore, the Warren Family Court was acting within its continuing jurisdiction regarding child custody and visitation.

In the alternative, Wells argues that he is entitled to a writ under the second class of writs. The second class requires a showing that: 1) the lower court is acting or is about to act erroneously, although within its jurisdiction; 2) there exists no adequate remedy by appeal or otherwise; and 3) great injustice and irreparable injury will result if the petition is not granted.[10] The problem with Wells' argument as to either class of writs is the same, there is (or was) a remedy available to him by appeal.

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[7] 299 S.W.3d 284 (Ky. App. 2009).

[8] Parental Kidnapping Prevention Act.

[9] 299 S.W.3d at 288.

[10] *Hoskins*, 150 S.W.3d at 10.

This Court has consistently held that an order denying a motion to intervene is immediately appealable.[11] In *City of Henderson v. Todd*:

> It was well settled under the former Civil Code that the filing of an intervening petition by an interested party was a matter of right and a denial thereof was an appealable order. Civil Rule 24.01 provides that upon timely application anyone *shall* be permitted to intervene in an action under described conditions, and CR 24.02 *permits* intervention under stated conditions. While it would appear that the denial of a motion for leave to intervene is interlocutory and not forthwith appealable, unless intervention is a matter of right we regard an appeal from an order denying intervention under either rule to be proper after final judgment in the case, even though a forthwith appeal would have been proper where intervention was a matter of right under CR 24.01. (internal citations omitted).[12]

Furthermore, in *A.H. v. W.R.L.*[13], this Court held that a mother's former same sex partner asserted a cognizable custodial interest and, thus, had a right to intervene under Kentucky Rule of Civil Procedure (CR) 24.01.[14] Similarly, Wells asserts he has a custodial interest in the children because he is Nelson's husband and helped co-parent the children.

CR 24.01, our matter of right intervention rule, states as follows:

> (1) Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the

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[11] *See City of Henderson v. Todd*, 314 S.W.2d 948 (Ky. 1958); *Hazel Enterprises, LLC v. Community Financial Services Bank*, 382 S.W.3d 65 (Ky. App. 2012); *Baker v. Webb*, 127 S.W.3d 622 (Ky. 2004); and *A.H. v. W.R.L*, 482 S.W.3d 372 (Ky. 2016).

[12] 314 S.W.2d at 951.

[13] 482 S.W.3d 372.

[14] *Id.* at 375.

> applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.
> (2) Anyone possessing a statutory right of intervention under (1)(a) above, may move the court to intervene in a pending action and, on failure of a party to file an objection within ten (10) days to the intervention and a notice of hearing on the objection, have an order allowing the intervention without appearing in court for a hearing.

Significantly, CR 24.03 requires that a pleading be submitted with the motion to intervene. According to the family court order denying his intervention, Wells failed to file a petition with his motion to intervene.

CR 24.03 states as follows:

> A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and **shall be accompanied by a pleading** setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene. When the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney General.

Wells had an opportunity to pursue a direct appeal regarding the denial of the intervention but has failed to do so. Consequently, Wells has failed to show a lack of potential remedy through an intermediate court and is not entitled to a writ of mandamus. Likewise, as a non-party, Wells has no standing to assert that Judge Holderfield should be removed as Judge in the underlying case.

For the foregoing reasons, we affirm the Court of Appeals.

All sitting. All concur.

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