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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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 29, 2019
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2019-SC-000120-MR

RACHEL ANN NANCE (now MULLINS) — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2018-CA-001862-OA
FAYETTE FAMILY CIRCUIT COURT NO. 12-CI-03427

HON. KATHY STEIN, JUDGE,
FAYETTE FAMILY COURT, DIVISION SIX — APPELLEES

AND

PATRICK SHANE NANCE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Rachel Ann Nance (now Mullins), (hereinafter "Rachel"), claims the Court of Appeals wrongly denied the petition for a writ of prohibition. She sought to prohibit the trial court from enforcing a November 15, 2018, order modifying the parties' joint custody decree to temporary sole custody and restricting timesharing and contact with her four (4) children.

Rachel and Patrick Shane Nance (hereinafter "Patrick") were married and had four children together. Patrick filed a Petition for Dissolution of Marriage on July 26, 2012. The divorce decree was granted by the Fayette Family Court

on January 14, 2013. The decree included an agreement to share joint custody of the children.

On November 2, 2018, Patrick refused to allow Rachel her timesharing with the children after, a court appointed LCSW[1], reported concerns of abuse. Through counsel, he filed an *ex parte* motion for emergency custody with the Fayette Family Court. However, no *ex parte* action was taken by the court. On November 5, 2018, Rachel filed a motion for contempt, immediate return of the children, attorney's fees, and sanctions. On the same day Patrick filed a petition for an emergency protective order (EPO) on behalf of the children.

The family court addressed all pending motions and orders at motion hour on November 9, 2018. By this time, Rachel's counsel had received a copy of the *ex parte* motion. The family court entered an order scheduling a hearing for November 15, 2018. During this hearing Rachel's counsel made no objections to hearing all motions and orders, and Rachel presented testimony regarding the *ex parte* emergency motion and entered it into the record as an exhibit. After the hearing the family court made the following determinations: (1) denied Rachel's motions for immediate return of the children, contempt, attorney's fees, and sanctions; (2) dismissed Patrick's EPO; and (3) granted temporary sole custody of the children to Patrick.

As this Court has repeatedly held, a writ of prohibition is an extraordinary remedy, that may be granted from two classes of cases. The first class requires

[1] Licensed Clinical Social Worker.

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."[2] To support her appeal, Rachel first argues that the family court acted beyond its jurisdiction because Patrick failed to file a proper motion for temporary sole custody, supported by an affidavit pursuant to KRS[3] 403.350.

Here, the trial court was not acting outside of its jurisdiction, as the concerns reflected in the *ex parte* emergency motion were addressed at a hearing in conjunction with additional orders and motions. Rachel received a copy of the emergency motion before the November 9th motion hour, she failed to make any objection to hearing the motion, she addressed the motion during the November 15th hearing, and she entered the motion as an exhibit into the court record. At the end of the hearing the trial court found that it was in the best interest of the children to grant temporary sole custody to Patrick.

So, Rachel's argument is really that the trial court acted contrary to KRS 403.350, rather than outside its jurisdiction. This Court has repeatedly held that focusing jurisdiction on legal error and not subject matter jurisdiction would be problematic. In *Lee v. George*,[4] this Court determined "[s]uch an understanding of jurisdiction would effectively gut our procedures for appellate review because, under such an approach, the lower court would be proceeding

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

[3] Kentucky Revised Statutes.

[4] 369 S.W.3d 29, 33 (Ky. 2012).

outside its jurisdiction *every time* it made an erroneous decision, and so an extraordinary writ would be available for every alleged error."

Rachel makes an additional argument under the second class of writ. 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."[5] She claims that a great injustice and irreparable injury will result if her petition is not granted. *Bender v. Eaton*,[6] defines "irreparable injury" under the second class of writs as something of a "ruinous nature". *Litteral v. Woods*,[7] describes it as "incalculable damage to the applicant...either to the liberty of his person, or to his property right, or other far-reaching and conjectural consequences." This Court in *Lee* noted that disputed child custody does not rise to the level of irreparable injury:

> 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

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

[6] 343 S.W.2d 799, 801 (Ky. 1961).

[7] 4 S.W.2d 395, 397 (Ky. 1928).

with the lower courts required by such a remedy is to be avoided whenever possible.[8]

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

All sitting. All concur.

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[8] 369 S.W.3d at 32.