

RENDERED: March 25, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001847-MR

NORMAN UTTERBACK AND
CALVIN UTTERBACK, CO-ADMINISTRATORS
OF THE ESTATE OF LIDA UTTERBACK

APPELLANTS

V. APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
CIVIL ACTION NO. 03-CI-90011

BETTY PERRY;
HONORABLE BETH LEWIS MAZE, JUDGE,
ROWAN CIRCUIT COURT, DIVISION II;
HONORABLE JOHN R. COX, JUDGE
ROWAN DISTRICT COURT

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; AND MILLER, SENIOR
JUDGE.¹

MINTON, JUDGE:

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

INTRODUCTION

While administration of the Estate of Lida Utterback, deceased, was pending, the district court granted a motion by the co-administrators, Norman and Calvin Utterback, and ordered Betty Perry to turn over funds that the court found to be estate assets. After Perry's appeal of that order was dismissed, she petitioned the circuit court for a writ of prohibition, asserting that she would suffer irreparable injury if required to turn the funds over to the co-administrators and await the outcome of an appeal from the final settlement of the estate. The circuit court agreed with Perry and granted the writ.

For a court to entertain an original action for the issuance of a writ of prohibition, the petitioner must prove that her case falls within one of two classes of cases: either the lower court has acted without subject matter jurisdiction, and there is no other remedy in a higher court; or the lower court has acted in error within its jurisdiction, and there is no adequate remedy by appeal or otherwise, resulting in great injustice and irreparable injury if the petition is not granted.²

We hold that Perry's petition fails to satisfy the prerequisites for the granting of a writ under either class of writ cases. First, the district court has not acted beyond its subject matter jurisdiction. Second, even if the district court

² Hoskins v. Maricle, 150 S.W.3d 1, 5-6 (Ky. 2004).

has erred in its ruling, Perry still has the right to an appeal from the final settlement or the statutory power to file an original action in circuit court under the declaratory judgment act or other statutes. So the circuit court erred when it granted the writ. Therefore, we vacate the order granting the writ and remand the case to circuit court for a dismissal of the petition.

THE FAMILY FEUD

This action arose in the district court where brothers Norman and Calvin Utterback had been appointed co-administrators of the estate of their deceased mother, Lida Utterback. During the pendency of administration, the district court held an evidentiary hearing on their motion to require their sister, Betty Perry, to account for and produce the funds from a bank account and a \$30,000 certificate of deposit (CD), both of which had been listed as jointly owned with right of survivorship by the decedent and Perry. Perry testified at the hearing and argued that these funds were hers by operation of law, citing Kentucky Revised Statutes (KRS) 391.315(1)(a).³ The district court ruled against Perry's contention, finding that the money from the account and the proceeds from the CD, which Perry had

³ The statute says that "[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties to the account as against the estate of the decedent unless there is clear and convincing written evidence of a different intention at the time the account is created."

cash, belonged to the estate. The district court ordered Perry to turn the funds over to the co-administrators for ultimate distribution.

Perry appealed this order to the circuit court, and the co-administrators moved the circuit court for dismissal of the appeal as interlocutory. The circuit court denied the motion to dismiss. In denying the co-administrators' subsequent motion to reconsider, the circuit court explained the basis of its ruling to be that a dismissal of the appeal "until a final settlement of the estate would subject [the funds] to distribution to other parties and subject [Perry] to irreparable harm should she prevail on appeal."

The co-administrators sought discretionary review in this court of these circuit court orders. We granted discretionary review; and in an unpublished opinion and order, vacated the circuit court's order and remanded the case to the circuit court with directions to dismiss the appeal. We held that the district court's order requiring Perry to turn over the funds was not a final and appealable order. Therefore, we held that the circuit court lacked jurisdiction to proceed in an appeal from a non-final order of the district court.⁴

⁴ Estate of Lida Utterback, deceased v. Betty Perry, 2002-CA-001996-DG (rendered December 20, 2002).

Following the disposition of the appeal, Perry quickly filed in circuit court a petition for a writ of prohibition against the co-administrators, the estate, and the district judge. Her petition alleged that

if she provides said funds to the Respondent, in accordance with the District Court's Order of 6/7/02, the Estate will diminish and disburse the funds such that Ms. Perry will not be able to recoup her loss following rendition of a final order by the District Court, and appellate review of the adverse rulings already entered. Ms. Perry asks that this Court issue a Writ of Prohibition barring the District Court from seizure or disbursement of Ms. Perry's bank account or CD until such time as a final ruling is made by the District Court, and all appellate steps are exhausted.

The co-administrators moved to dismiss the petition arguing that Perry was simply returning to circuit court for "another bite at the apple." They urged dismissal because "[Perry] will have an opportunity to once again make the substantive argument in relation to the funds when the final settlement is filed. Until such time her arguments are premature, and she has not adequately demonstrated 'exceptional situations [where] there is no other adequate remedy at law to prevent a miscarriage of justice [citation omitted].'"

The circuit court granted the writ. In contrast to the district court's findings, the circuit court ruled without a hearing that the jointly owned bank account and CD belonged to

Perry under KRS 391.315. Based upon that finding, the court concluded that the "decisions concerning the accounts are not within the jurisdiction of the [district court]." The court further found that "to allow the Estate to have control over the funds would subject [Perry] to irreparable harm and would amount to a miscarriage of justice." Finally, the court found that Perry had no adequate remedy by appeal and that granting this writ was the only way to prevent "irreparable harm and a miscarriage of justice." This appeal followed.

ANALYSIS

Because writs of prohibition disrupt the orderly, even if erroneous, proceedings of a trial court and the efficient discharge of appellate duties, our courts "have always been cautious and conservative both in entertaining petitions for and in granting such relief."⁵ Regarding the rule for the issuance or denial of a writ, our high court has stated:

Through the years this Court has consistently divided into two classes those cases in which we are called upon to exercise original jurisdiction. The distinguishing feature is whether the inferior court allegedly is (1) acting without jurisdiction (which includes 'beyond its jurisdiction'), or (2) acting erroneously within its jurisdiction.⁶

⁵ Bender v. Eaton, 343 S.W.2d 799, 800 (Ky. 1961).

⁶ *Id.*

Since the circuit court's order granting the writ seems to touch upon both classes of cases, we must review as to both classes. Our review of the original action in circuit court is limited to an appellate review. And since the dispositive issues are purely questions of law, the applicable appellate review standard is de novo.⁷

We will analyze the present case first under the first class of writ cases because the wording of the order suggests that the circuit court may have based its decision to grant the writ on the conclusion that the district court acted outside its jurisdiction by issuing the order requiring Perry to turn over the funds. Certainly, this is Perry's interpretation of the writ as announced in the opening sentence of the argument in her brief: "The [circuit court] properly found that the [district court] was acting outside of its jurisdiction when it issued orders declaring the accounts to be the property of the Estate of Lida Utterback" ⁸ But we disagree with this assertion, if it is accurate.

KRS 24A.120(2) grants the district court original and exclusive jurisdiction in "[m]atters involving probate, except matters contested in an adversary proceeding." And KRS 24A.120(3) provides that "[m]atters not provided for by

⁷ Grange Mutual Insurance Company v. Trude, 151 S.W.3d 803, 808-809 (Ky. 2004).

⁸ Appellee's Brief, p. 1.

statute to be commenced in Circuit Court shall be deemed to be nonadversarial within the meaning of subsection (2) of this section and therefore are within the jurisdiction of the District Court."

The controversy over the jointly held funds arose by motion in the district court after the appointment of the Utterback brothers as co-administrators of the estate and before they made the required final settlement in the district court. All interested parties litigated the application of KRS 391.315 before the district court. Regardless of how energetically contested, there is nothing in that statute that requires that disputes like this one must be heard in the circuit court. So the district court did not exceed the bounds of its probate jurisdiction when it entertained the co-administrators' motion to collect the funds by applying KRS 391.315, however erroneous the district court may have been in its application of that statute. Therefore, we conclude that the circuit court erred to the extent that it premised the granting of the writ on the conclusion that the district court was acting beyond its jurisdiction. Moreover, as we discuss below, Perry has available remedies elsewhere.

Analyzing the present case under the second class of writ cases, writs of prohibition "ordinarily ha[ve] not been granted unless the petitioner established, as conditions

precedent, that [the petitioner] (a) had no adequate remedy by appeal or otherwise, and (b) would suffer great and irreparable injury (if error has been committed and relief denied)."⁹ Our cases "have consistently (apparently without exception) required the petitioner to pass the first test; i.e., [the petitioner] must show [that the petitioner] has no adequate remedy by appeal or otherwise."¹⁰

We conclude that Perry also fails this threshold legal test and for at least two reasons. First, she has an adequate remedy by appeal. Perry retains the option to contest the final settlement in the district court.¹¹ If disappointed by the district court's ruling, she may prosecute an appeal of the final settlement on the record to the circuit court.¹² Furthermore, our cases have held that "[f]inancial loss alone does not necessarily constitute such great and irreparable injury" to satisfy test (b) of the rule as discussed in Bender.¹³

Second, Perry may sooner avail herself of the statutory power to file an original action for a declaratory

⁹ Bender, *supra*, at 800 (emphasis in original).

¹⁰ *Id.*

¹¹ KRS 395.630.

¹² KRS 23A.080; Kentucky Rules of Civil Procedure (CR) 72.

¹³ Reeves v. Bell, 285 Ky. 300, 147 S.W.2d 711, 715 (1941); Henneberger Company's Assignee v. Price, 252 Ky. 402, 67 S.W.2d 471 (1934); Union Trading Co. v. Hubbard, 252 Ky. 518, 67 S.W.2d 693 (1934).

judgment in the circuit court.¹⁴ Upon the filing of a statutory action in circuit court, the contest over the funds is an adversarial matter; and subject matter jurisdiction is transferred to the circuit court.¹⁵ And since the district court's decision is not final on the merits of the ownership of the funds in question, the parties are not precluded from a trial de novo in circuit court.

One final point of consequence requires discussion. In addition to reiterating the rule that a writ prohibiting a trial court from acting erroneously within its jurisdiction when there is "no adequate remedy by appeal or otherwise" and the petitioner will suffer "great and irreparable injury" if the petition is not granted, Bender v. Eaton further explained that those requirements are but "a practical and convenient formula for determining, *prior to deciding the issue of alleged error*, if petitioner may avail himself of this remedy."¹⁶ "In other words, only after determining that the prerequisites exist will the court decide whether an error occurred for which a writ should issue."¹⁷ Since Perry failed, as a matter of law, to meet the threshold tests, it was impossible for the circuit court to

¹⁴ KRS 394.240.

¹⁵ Mullins v. First American Bank, 781 S.W.2d 527, 529 (Ky.App. 1989).

¹⁶ *Supra* at 801 (emphasis in original).

¹⁷ Hoskins, *supra* at 18.

reach the decision whether an error had occurred for which the writ should issue. Therefore, the circuit court erred by proceeding to consider the merits of the dispute over the ownership of the funds.

DISPOSITION

For the reasons discussed in this opinion, we vacate the circuit court's order granting the writ of prohibition in its entirety, and we remand the case to the circuit court with directions that the petition be dismissed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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