

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF THE	§	
PETITION OF DERRIK N.	§	No. 451, 2004
SCARPINATO FOR A WRIT OF	§	
PROHIBITION	§	

Submitted: October 25, 2004

Decided: January 7, 2005

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 7<sup>th</sup> day of January 2005, upon consideration of the petition of Derrick N. Scarpinato for a writ of prohibition, it appears to the Court that:

(1) Petitioner seeks a writ of prohibition to prevent the Family Court from entering any orders “where a pending petition is lacking and where there is no notice or an opportunity for a hearing.” Petitioner’s request stems from a Family Court hearing in which the judge entered a temporary visitation order where no petition to modify visitation had been filed. Petitioner alleges that his due process rights were violated because he had no prior notice that a temporary visitation order would be entered.

(2) The record reflects that Scarpinato (“Father”) and Jannifer Nehring (“Mother”) were present at a hearing in the Family Court on September 9, 2004. The hearing was scheduled to address Mother’s petition for a rule to show cause

and Father's motion to dismiss Mother's petition for a rule to show cause. Mother's petition alleged that Father was in contempt of two previous Family Court orders regarding Mother's visitation with the parties' minor child.<sup>1</sup> After hearing the testimony of the parties, the Family Court determined that Father was not in contempt of either visitation order.

(3) Even though Father's counsel objected to the entry of a permanent order regarding visitation, the Family Court deemed it necessary to enter a temporary visitation order pending the filing by Mother of a petition to modify visitation and the scheduling of a hearing on that petition.<sup>2</sup> To enter a temporary visitation order, the Family Court deemed it necessary to hear some testimony from the parties that arguably was beyond the scope of the petitions being addressed.<sup>3</sup>

(4) A writ of prohibition is the legal equivalent of the equitable remedy of injunction and may be issued to prevent a lower court from proceeding in a matter where it has no jurisdiction, or to prevent it from exceeding its jurisdiction

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<sup>1</sup> It appears that those orders governed Mother's visitation with the parties' minor son during the time she was living in Delaware. At the time Mother filed the petition for a rule to show cause, she had moved to Washington, D.C.

<sup>2</sup> Mother's counsel represented that he would immediately file a petition to modify visitation in light of the fact that Mother was now living outside of Delaware, for which reason (counsel urged) the prior orders were no longer applicable.

<sup>3</sup> The Family Court's temporary visitation order established visitation every other week-end at Mother's aunt's home in Delaware.

in a matter that is properly before it.<sup>4</sup> The jurisdictional defect must be manifest upon the record.<sup>5</sup> The burden is on the petitioner to demonstrate to this Court, by clear and convincing evidence, that the trial court is without jurisdiction in the matter or is attempting to exceed its jurisdiction.<sup>6</sup> A petition for a writ of prohibition will be denied if the petitioner has a remedy at law through the ordinary appeal process.<sup>7</sup>

(5) In his petition, Father has not satisfied his burden of showing that the equivalent of an injunction is required to prevent the Family Court from exceeding its jurisdiction. The temporary visitation order in question has already been issued and, therefore, an injunction is not an appropriate remedy; moreover, Father has a remedy through the ordinary appeal process.

NOW, THEREFORE, IT IS ORDERED that the petition for a writ of prohibition is DISMISSED.

BY THE COURT:

/s/Jack B. Jacobs  
Justice

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<sup>4</sup> *In re Hovey*, 545 A.2d 626, 628 (Del. 1988).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 629.

<sup>7</sup> *Matushefske v. Herlihy*, 214 A.2d 883, 885 (Del. 1965).