

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)**

ERPELDING V. SOUTHALL

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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SHAWN R. ERPELDING, APPELLANT,

v.

DIANE M. SOUTHALL, APPELLEE.

Filed March 26, 2024. No. A-23-189.

Appeal from the District Court for Buffalo County: JOHN H. MARSH, Judge. Affirmed.

Shawn R. Erpelding, pro se.

No brief for appellee.

PIRTLE, Chief Judge, and RIEDMANN and WELCH, Judges.

RIEDMANN, Judge.

INTRODUCTION

Shawn R. Erpelding appeals the Buffalo County District Court's orders overruling his petition for writ of error coram nobis and denying his motions to compel and for appointment of counsel. After reviewing the record, we affirm.

BACKGROUND

Erpelding filed a complaint in May 2012 to establish paternity, custody, and visitation for his 4-year-old daughter who was born out of wedlock to Diane M. Southall. The district court entered a temporary parenting plan granting Southall primary physical and legal custody of the minor child. In August 2012, the district court ordered Erpelding to pay temporary child support in the amount of \$225 per month.

On April 9, 2013, the district court issued an order to show cause why the case should not be dismissed for lack of prosecution. It observed that there was no activity in the case since the

temporary order for child support was entered in August 2012. It gave the parties 20 days to respond and warned that failure of the parties to show adequate cause would result in the instant matter being summarily dismissed.

On May 3, 2013, Southall's counsel filed a notice of final hearing, which was scheduled for June 20. After the notice of final hearing, Erpelding's counsel motioned to withdraw as counsel, stating that there had been a breakdown in communication between him and Erpelding. The district court granted the motion. On June 19, Southall filed an answer and counterclaim, in which she admitted that Erpelding was the minor child's father. In her counterclaim, Southall requested a finding of paternity, sole physical and legal custody of the minor child, and child support.

The final hearing was held on June 20, 2013. Erpelding did not appear. In its written order, the district court found that Erpelding was the minor child's father. It awarded Southall sole legal and physical custody of the child, subject to Erpelding's parenting time. It also ordered that Erpelding pay child support in the amount of \$379 per month and medical support in the amount of \$62 per month.

Erpelding's Nonsupport Conviction.

Erpelding failed to make any payments on the temporary child support for over a year and did not make any payments for child support after the final order was issued in July 2013. Erpelding was eventually arrested and charged with criminal nonsupport based on his failure to pay the first 4 months of the temporary support obligation. He was also charged as a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 2016).

Following a jury trial, Erpelding was convicted of four counts of criminal nonsupport. *State v. Erpelding*, 292 Neb. 351, 874 N.W.2d 265 (2015). At sentencing the trial court determined he was a habitual criminal under § 29-2221 and sentenced him to concurrent terms of 10 to 15 years' imprisonment on each count. *State v. Erpelding, supra*. Erpelding appealed and his convictions and sentences were affirmed by the Nebraska Supreme Court in December 2015. See *id.*

Erpelding Files Petition for Writ of Error Coram Nobis.

After exhausting his criminal appeals, Erpelding filed a complaint to vacate and set aside paternity and child support judgments in 2019. See, *State v. Erpelding*, No. A-17-332, 2018 WL 3752164 (Neb. App. Aug. 7, 2018) (selected for posting to court website); *Erpelding v. Southall*, No. A-19-825, 2020 WL 2544891 (Neb. App. May 14, 2020) (selected for posting to court website). The district court denied Erpelding's complaint to vacate and set aside the July 2013 order, and we affirmed the district court's order on appeal. See *Erpelding v. Southall, supra*.

Erpelding filed a petition for writ of error coram nobis on April 11, 2022. He claimed that his 2012 lawsuit to establish paternity of his minor child was summarily dismissed for lack of prosecution based on the April 4, 2013, order to show cause. Because his paternity case was dismissed for lack of prosecution on April 4, he argues the district court did not have jurisdiction for the subsequent proceedings that established his paternity and ordered him to pay child support. He requested the district court grant him a writ of error coram nobis acknowledging that the district court did not have jurisdiction over his case after April 2012. The district court was unable to take any action on Erpelding's petition because he had not paid the filing fee.

On May 3, 2022, Erpelding filed a motion and affidavit to proceed with verified petition for writ of error coram nobis and request for evidentiary hearing in forma pauperis. The district court granted Erpelding's motion to proceed in forma pauperis.

District Court Overrules Erpelding's Petition for Writ.

On February 6, 2023, the district court held a hearing on the merits of Erpelding's petition for writ of error coram nobis. At the hearing, Erpelding mentioned for the first time that the presiding judge had once represented him in a criminal matter. Specifically, Erpelding explained, "You represented me, they were . . . [my attorney] couldn't make it for a court appearance and so they—they-he put you there, because it was just a preliminary hearing." Erpelding continued "so it shouldn't be a conflict of interest for you" and "I don't have a problem with you, you know what I'm saying." The district court took Erpelding's petition for writ of error coram nobis under advisement.

The district court overruled Erpelding's petition in a written order. It first addressed Erpelding's comment that the judge represented him in a prior case. It explained that it appeared he had represented Erpelding at a hearing related to his criminal nonsupport case, and Erpelding had not sought recusal, so the court declined to recuse itself.

Second, the court explained that a writ of error coram nobis was not the proper remedy for the relief Erpelding sought. A writ of error coram nobis is used for matters of fact; however, the basis of Erpelding's petition was that the court did not have jurisdiction, which is a question of law. It also stated that the order to show cause which threatened automatic dismissal absent timely compliance was a conditional order; thus, it was wholly void because such order does not perform in praesenti.

Erpelding filed a notice of appeal, praecipe for a bill of exceptions, and a praecipe for a transcript on March 8, 2023.

Erpelding's Motion to Compel.

On May 18, 2023, Erpelding filed an amended motion to compel. In his motion, Erpelding notes that after he requested a transcript from the county, he received a partial transcript that was missing important documents. Erpelding contended that the judge's notes were missing in the transcript, and in those judge's notes would be the dismissal of his 2013 case. His motion to compel requested the clerk of the court to provide him with the full transcript.

On May 22, 2023, the district court overruled Erpelding's motion to compel. It reasoned that the manner of preparing transcripts is governed by the Nebraska Court Rules of Appellate practice and those rules do not include a motion to compel. Rather, a motion to compel is typically used to obtain discovery from a party in civil cases and the clerk of the court was not a party to the lawsuit. Furthermore, because the court overruled Erpelding's petition for writ of error coram nobis in February, there was no pending matter in front of the district court. Thus, the district court denied Erpelding's motion to compel.

Erpelding's Motion to Appoint Counsel.

On April 5, 2023, Erpelding filed a motion for appointment of appellate counsel. He contended that the district court's decision ordering him to pay child support impacted his liberty

when he was later imprisoned for not paying that child support; thus, the deprivation of his liberty was at stake. The district court denied Erpelding's motion.

Erpelding appeals the district court's orders denying his petition for writ of error coram nobis, motion to compel, and motion to appoint appellate counsel.

ASSIGNMENTS OF ERROR

Erpelding assigns the district court erred by (1) overruling and dismissing his petition for writ of error coram nobis; (2) denying his motion to compel without an evidentiary hearing; (3) not disqualifying itself due to a conflict of interest; and (4) not appointing counsel.

STANDARD OF REVIEW

One seeking a writ of error coram nobis has the burden to prove entitlement to such relief. *State v. Diaz*, 283 Neb. 414, 808 N.W.2d 891 (2012). Findings of the district court in connection with its ruling on a motion for a writ of error coram nobis will not be disturbed unless clearly erroneous. *Id.*

Decisions regarding discovery are directed to the discretion of the trial court and will be upheld in the absence of an abuse of discretion. *Moreno v. City of Gering*, 293 Neb. 320, 878 N.W.2d 529 (2016). The party asserting the error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion. *Id.*

A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings. *State v. Buttercase*, 296 Neb. 304, 893 N.W.2d 430 (2017), *abrogated on other grounds*, *State v. Ezell*, 314 Neb. 825, 993 N.W.2d 449 (2023).

ANALYSIS

Writ of Error Coram Nobis.

Erpelding argues that he was entitled to a writ of error coram nobis because the district court dismissed his paternity suit after it issued its order to show cause on April 9, 2013. He explains that since the district court had dismissed his paternity suit, it lost jurisdiction over the case, and thus, Southall's counterclaim and the district court's subsequent orders for child support were void.

The common-law writ of error coram nobis is provided in statute under Neb. Rev. Stat. § 49-101 (Reissue 2021). The statute adopts English common law to the extent that it is not inconsistent with the Constitution of the United States, the organic law of Nebraska, or any law passed by the Nebraska Legislature. *State v. Diaz*, *supra*. The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. *Id.* It enables the court to recall some adjudication that was made while some fact existed which would have prevented rendition of the judgment but which, through no fault of the party, was not presented. *Id.* The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming the error. *Id.*

The Supreme Court has stated a writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court would have prevented entry of judgment. *Id.* The writ of error coram nobis is not available to correct errors of law. *Id.*

Here, there is no order dismissing Erpelding's paternity suit. A show cause order is a conditional order, as it is an order that specifies that a trial court will or will not exercise its jurisdiction based on future action or inaction by a party. See *Evert v. Srb*, 308 Neb. 895, 957 N.W.2d 475 (2021). The district court's show cause order directed the parties to show cause why the case should not be dismissed. It stated that failure to respond within 20 days would result in the case being dismissed. However, no order of dismissal was entered and shortly after the time expired, counsel filed a notice of final hearing. Because the show cause order was a conditional order that had no force and effect as a final order, and there was no final order dismissing Erpelding's paternity suit, Erpelding's case was not dismissed. See *id.*

The basis of Erpelding's claim is that the district court summarily dismissed his paternity suit in April 2013 after it ordered the parties to show cause. Erpelding's argument turns on whether the court had jurisdiction to hear Southall's counterclaim and order child support payments after April. A question of jurisdiction is a question of law. See *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017). Writs of error coram nobis only reach matters of fact and are not available to correct errors of law. See *State v. Diaz*, 283 Neb. 414, 808 N.W.2d 891 (2012). Since Erpelding's claim centers on a question of law, and not fact, a writ of error coram nobis is not the proper vehicle for the relief he seeks. Therefore, the district court did not err in overruling Erpelding's petition.

Motion to Compel.

Erpelding assigns the district court erred by overruling his motion to compel without an evidentiary hearing. Erpelding argues that upon filing his notice of appeal, he requested a transcript from his 2012 paternity suit, yet the clerk of the court failed to include the judge's notes because she claimed no judge's notes existed for that case. Erpelding argued that judge's notes existed and filed in the district court a motion to compel the clerk to produce them.

Generally, a trial court loses jurisdiction once a party appeals. *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016). For an appellate court to acquire jurisdiction of an appeal, there must be a final judgment or final order entered by the tribunal from which the appeal is taken. *In re Interest of A.A. et al.*, 307 Neb. 817, 951 N.W.2d 144 (2020).

Here, the district court overruled Erpelding's petition for writ of error coram nobis on February 6, 2023, which was a final order. Erpelding perfected his appeal by filing a notice of appeal on March 8, which extinguished the district court's jurisdiction over the matter. Erpelding then brought his first motion to compel on May 11, and his amended motion to compel on May 18. The district court did not have jurisdiction over Erpelding's motion, as this court had gained jurisdiction over Erpelding's case when he perfected his appeal. Therefore, the district court did not err by denying Erpelding's motion to compel.

Recusal.

Erpelding assigns the district court erred by not disqualifying itself from the case because the judge had represented Erpelding in his criminal nonsupport case. This objection has been waived.

Judges should recuse themselves when a litigant shows that a reasonable person, who knew the circumstances of the case, would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown. *Buttercase v. Davis*, 313 Neb. 1, 982 N.W.2d 240 (2022). A litigant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *Id.* A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but objection was raised well after the judge has participated in the proceedings. *State v. Buttercase*, 296 Neb. 304, 893 N.W.2d 430 (2017), *abrogated on other grounds*, *State v. Ezell*, 314 Neb. 825, 993 N.W.2d 449 (2023).

Here, Erpelding never motioned for the judge to recuse himself. Even at his hearing on the petition for writ of error coram nobis, Erpelding admitted there was no conflict of interest and told the judge, "I don't have a problem with you." Erpelding appeared before this judge in prior hearings dating back to 2019, yet never brought a motion seeking recusal. Therefore, Erpelding waived any objection he had to the judge presiding over his case. See *Landrum v. City of Omaha Planning Bd.*, 297 Neb. 165, 899 N.W.2d 598 (2017) (raising issue first time on appeal will not be considered).

Erpelding's Motion for Appointment of Counsel.

Erpelding assigns the district court erred by denying his motion for appointment of counsel and abused its discretion by refusing to appoint counsel for a financially eligible litigant. He relies on *Poll v. Poll*, 256 Neb. 46, 588 N.W.2d 583 (1999), *disapproved on other grounds*, *Gibilisco v Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002), to contend that he deserves counsel for this case because his liberty is at stake.

In *Poll v. Poll*, *supra*, the Supreme Court stated "under Nebraska law, in either a criminal or a civil action, due process may require appointment of counsel where a significant right is at stake in a case ordinarily brought on by the State or where a deprivation of liberty is threatened." *Id.* at 52, 588 N.W.2d at 587. Here, Erpelding is already incarcerated as a result of his criminal nonsupport convictions. The current action was not brought by the State, nor does it threaten Erpelding's physical liberty; rather, it is an action commenced by him in which he seeks release from incarceration. Because the current action does not put Erpelding's liberty at stake, he was not entitled to appointed counsel. Therefore, the district court did not err by denying Erpelding's motion for the appointment of counsel.

CONCLUSION

For the foregoing reasons, we affirm.

AFFIRMED.