

No. SC88442

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IN THE  
SUPREME COURT OF MISSOURI

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MURLIN R. PHILLIPS,

Appellant,

v.

JASPER N. EDMONDSON,

Respondent.

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APPEAL FROM THE CIRCUIT COURT OF STODDARD COUNTY, THIRTY-FIFTH  
JUDICIAL DISTRICT, THE HONORABLE THOMAS L. RAY

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AMICUS BRIEF

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## Argument

Chapter 460 is constitutional because it does not prevent an inmate under the custody of the Missouri Department of Corrections from suing or being sued in his own name. The trial court misapplied Chapter 460, RSMo (2000), because nothing in this chapter mandates that an action filed by an inmate be dismissed unless he requests a trustee under Chapter 460.

### **A. Standard of Review**

The standard of review for the constitutional issues raised by the parties is de novo. *Jamison v. Missouri Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399, 404 (Mo. banc 2007).

Although the specific order being challenged is a dismissal without prejudice, the Court may review the dismissal.

Ordinarily, when an action is dismissed without prejudice, a plaintiff may cure the dismissal by filing another suit in the same court, and, therefore, a dismissal without prejudice is not a final judgment for the purpose of appeal. An exception to this general rule is that an appeal can be taken where the dismissal has the practical effect of terminating the litigation in the form presented by the plaintiff. *State ex rel. Dos Hombres-Independence, Inc. v. Nixon*, 48 S.W.3d 76, 79 (Mo. App. W.D. 2001) (citations omitted). The order to dismiss without prejudice in this case effectively bars Phillips from ever filing the case in his own name because tolling no longer applies while an inmate is incarcerated. *See* § 516.170, RSMo (2000); 1990 H.B. 974 (eliminating tolling for a person “imprisoned on a criminal charge”).

**B. Chapter 460 is constitutional because it does not prevent an inmate under the custody of the Missouri Department of Corrections from suing or being sued in his own name.**

“Because a statute is cloaked in a presumption of constitutionality, an appellate court may find the statute unconstitutional only if it clearly contravenes a specific constitutional provision.” *Jamison*, 218 S.W.3d at 404-05 . All doubt as to the constitutionality of a statute must be resolved in favor of a statute being constitutional. *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984).

Before discussing Chapter 460 as it stands today, it is necessary to look at the historic changes to the status of inmates to sue and be sued in their own name and the historic changes to Chapter 460.

Before 1977, an inmate could not sue or be sued in his own name because he was under a civil disability or “civil death.” § 222.010, RSMo (1969). In 1977, the United States District Court for the Western District of Missouri ruled that § 222.010, RSMo (1969), is unconstitutional. *Thompson*, 421 F.Supp. 878, 885 (W.D. Mo. 1976). The Missouri General Assembly repealed § 220.010 as of January 1, 1979. 1977 S.B. 426. Thus, civil death is no longer a concept in Missouri law. *See* § 561.016.1, RSMo (2000) (regarding legal disqualification or disability based on a conviction or sentence).

Though the Legislature repealed the civil death statute, it did not repeal Chapter 460. As stated by the Court of Appeals, Western District, “the fact remains that the law is well established in this state that a suit which attacks the property of a convict may not result in a valid judgment unless a trustee has been appointed pursuant to statute.”

*American Family Mutual Insurance Company v. Mason*, 702 S.W.2d 848, 852 (Mo. App. W.D. 1985). As such, even after the repeal of the civil death statutes, inmates still could not sue or be sued in their own name.

The state of the law changed in 1990 when the legislature repealed Chapter 460 in its entirety but reenacted §§ 460.100 and 460.250. 1990 H.B. 974; 1990 S.B. 563. *See Berdella v. Penter*, 821 S.W.2d 846, 849-50 (Mo. banc 1992) (discussing the 1990 changes to Chapter 460). The result of the Legislature repealing Chapter 460 in its entirety is that the case law based on these statutes (i.e., based on anything in the chapter except the two remaining provisions) is no longer precedent; the repeal has “the effect of blotting them out completely as if they never existed.” *Harkey v. Mobley*, 552 S.W.2d 79, 81 (Mo. App. 1977). As such, the “well established” law concerning the ability of an inmate to sue or be sued in his own name no longer applies.

The plain language of the provisions that remain in Chapter 460 does not mandate a trial to require the appointment of a trustee. “The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning.” *Farmers’ and Laborers’ Co-op Ins. Ass’n v. Director of Revenue*, 742 S.W.2d 141, 145 (Mo. banc 1987). Sections 460.100 and 460.250, RSMo (2000), are silent as to when a court must require the appointment of a trustee. These provisions merely state the powers of a trustee when the trustee is appointed and that the court shall allow the trustee reasonable compensation when appointed.

The provision that previously required a trustee to be appointed was § 460.010, RSMo (1986). *Schrader v. Summerville*, 763 S.W.2d 717, 719 (Mo. App. E.D. 1986). The legislature repealed this section and did not reenact it in any form. 1990 H.B. 974; *see* Chapter 461, RSMo (2000). The apparent intent of the legislature in repealing this provision was to no longer require a trustee for an inmate to sue or be sued.

In his suggestions in support of dismissal, Edmundson relied on *Berdella* for the proposition that inmates may not sue in their own names. (Appendix, A2).<sup>1</sup> This reliance is misplaced. In *Berdella*, the inmate had already filed for the appointment of a trustee and was suing that trustee. *Berdella*, 821 S.W.2d at 848. In *Berdella*, the court holds that once a trustee has been appointed then the inmate may not sue in his own name in cases involving his assets. *Id.* at 851-51. *Berdella* does not hold that Chapter 460 requires an inmate to request the appointment of a trustee in all cases. *Id.* As stated in *Berdella*, the purpose of Chapter 460 is “to protect creditors, and other ‘interested persons,’ from the potential squandering of an inmate’s estate while the inmate was incarcerated.” *Id.* at 850. Chapter 460 is not an obstacle an inmate must overcome to sue or be sued in his own name.

In *Lockhart v. Middleton*, 863 S.W.2d 367 (Mo. App. W.D. 1993), the Court of Appeals, Western District, affirmed that suing an inmate in his own name is permissible

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<sup>1</sup> The Defendant’s Memorandum in Support of Defendant’s Motion to Dismiss and In Response to Plaintiff’s Brief in Opposition to a Stay Order is not in the legal file, though the legal file does reference this document on page five.



without the appointment of a Chapter 460 trustee, even if the judgment may affect the inmate's assets. The court observed that prior to the 1990 change to Chapter 460 a trustee was required before entry of judgment against an inmate. But the court held that a trustee is no longer required because of the repeal of all but two sections of Chapter 460. *Id.* at 370. If one no longer needs to request a trustee for a judgment against an inmate, then the inmate no longer needs to request a trustee to sue in his own name.

The affirmation of the dismissal in this case would have far-reaching consequences to the citizens and government of the State of Missouri. If the Court upholds this case, inmates in Missouri would only have access to the courts in limited circumstances, a limitation that may be unconstitutional. *See Thompson v. Bond*, 421 F.Supp. at 883-84 (discussing that prisoners have the right to seek relief through the judicial process). Furthermore, it would also have an impact on the citizens and the government of the State of Missouri. For example, if a spouse of an inmate wishes to divorce the inmate and had property to distribute, then a Chapter 460 trustee must be appointed. *See McLaughlin v. McLaughlin*, 129 S.W. 21, 27 (Mo. 1910) (discussing divorce with property under the laws mandating a trustee for inmates). And an affirmation of the dismissal would also call into question the validity of the judgments in a variety of other actions, including foreclosure, child support modification, and cases involving court costs. The Court, however, does not need to reach these issues because Chapter 460 does not mandate that a Chapter 460 trustee in an action against an inmate or filed by an inmate.

### **Conclusion**

The decision of the trial court should be reversed.

Respectfully submitted,

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**Certificate of Service**

The undersigned counsel hereby certifies that the foregoing brief was mailed, postage prepaid, this 2nd day of August, 2007, to Murlin R. Phillips #1076701, JCCC, 8200 No More Victims Road, Jefferson City, MO 65101, and Curtis O. Poore, 2851 Professional Court, Suite C, Cape Girardeau, MO 63703.

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**Certificate of Compliance**

This brief includes the information required by Missouri Supreme Court Rule 55.03, and pursuant to Rule 84.06(b), the undersigned counsel hereby certifies that Respondent's brief complies with the type-volume limitation, in that, it was prepared with Microsoft Word (Times New Roman, 13-point font), and contains 1,822 words. In addition, the undersigned counsel hereby certifies that the enclosed diskette has been scanned for viruses and found virus free.

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