

IN THE MISSOURI SUPREME COURT

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|   |   |                    |
|---|---|--------------------|
| STATE OF MISSOURI ex rel.                               | ) |                    |
| Christopher Barton,                                     | ) |                    |
| Relator   | ) |                    |
|   | ) |                    |
| vs.   | ) | Appeal No. SC84643 |
|   | ) |                    |
| The Honorable Carol Kennedy Bader                       | ) |                    |
| Juvenile Judge of The Twenty-third Circuit of Missouri) | ) |                    |
| Respondent.   | ) |                    |

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From the Circuit Court of Jefferson County, Missouri

Twenty-Third Judicial Circuit

Division 10

Honorable Carol Kennedy Bader

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RELATOR'S BRIEF

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### JURISDICTIONAL STATEMENT

This action is one requesting an original remedial Writ from this court under Missouri Supreme Court Rule 97, because Relator has no adequate remedy on appeal, to determine whether or not the trial court can retain jurisdiction by overruling a timely Motion for Change of Judge under Missouri Supreme Court Rules for Juvenile Court 126.01 and hence is controlled by this court under the provisions of Article V, Section 4 of the Constitution of Missouri.

## STATEMENT OF FACTS

Relator is the father of three minors; Robert Barton, Sandra Barton and Jeffrey Barton. On February 8, 2002, the Missouri Department of Social Services, Division of Family Services, requested a temporary custody order for the children that was granted February 9, 2001, and a protective custody hearing was set for February 21, 2001. On February 20, 2001, Relator applied to the court for a court appointed attorney, which was denied by Respondent on February 21, 2001, but the protective custody hearing was continued to February 28, 2001. Relator placed the children in the temporary legal custody of "DFS" on February 28, 2001.

On April 25, 2001, Relator denied the allegations of the Petition for Corrective Treatment filed February 9, 2001 and requested the petition set for trial; trial was set for August 15, 2001. At that time, the children were placed in the legal custody of Division of Family Services; and placed in foster care; several dispositional hearings were held at later times, continuing legal custody. Respondent, at permanency planning hearing on February 4, 2002, found it in the best interest of the children that their permanency plan be "TERMINATION".

The Juvenile Office filed Petition to Terminate Parental Rights of Mother and Relator on March 15, 2002, and hearing was set on June 17, 2002. Respondent approved Relator's application for appointment of attorney and appointed Mary J. Lake as attorney for Relator on June 3, 2002.

At first hearing on June 17, 2002, Relator denied the allegations of the petition and requested hearing. Respondent set the cause for trial on November 12, 2002. On June 18, 2002, Relator filed his Motion for Change of Judge. By order dated June 19,

2002, Respondent denied Relator's motion by annotation, "REQUEST FOR CHANGE OF JUDGE DENIED AS UNTIMELY FOR THE REASON THAT THE COURT HAS PRIOR AND CONTINUING JURISDICTION OVER THE JUVENILES."

Thereafter, Relator applied for a Writ of Prohibition in this cause.

POINTS RELIED ON

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE JUVENILE CAUSE NUMBERS JU301-0090, JU301-0091 AND JU301-0092, IN THE MATTER OF ROBERT BARTON, SANDRA BARTON AND JEFFREY BARTON, OTHER THAN VACATING HER ORDER OF JUNE 19, 2002 AND SUSTAINING RELATOR'S MOTION FOR CHANGE OF JUDGE BECAUSE MISSOURI SUPREME COURT RULES FOR JUVENILE COURT 126.01 PROVIDES THAT A CHANGE OF JUDGE SHALL BE ORDERED UPON APPLICATION OF A PARTY FILED WITHIN FIVE DAYS AFTER A TRAIL DATE HAS BEEN SET, IN THAT RESPONDENT SET THE PETITIONS TO TERMINATE PARENTAL RIGHTS FOR TRIAL BY ORDER DATED JUNE 17, 2002, RELATOR FILED HIS MOTION FOR CHANGE OF JUDGE ON JUNE 18, 2002 AND RELATOR OVERRULED RELATOR'S MOTION ON JUNE 19, 2002.

State ex rel. Cohen v. Riley, 994 SW 2<sup>d</sup> 546 (Mo. banc 1999)

State ex rel. K-Mart Corporation v. Holliger, 986 SW 2<sup>d</sup> 165 (Mo. banc 1999)

State ex rel. Raack v. Kohn, 720 SW 2<sup>d</sup> 941 (Mo. banc 1986)

Sections 530.010, 530.020, R.S. Mo.

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POINTS RELIED ON

II. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE JUVENILE CAUSE NUMBERS JU301-0090, JU301-0091 AND JU301-0092, IN THE MATTER OF ROBERT BARTON, SANDRA BARTON AND JEFFREY BARTON OTHER THAN VACATING HER ORDER OF JUNE 19, 2002 AND SUSTAINING MOTION FOR CHANGE OF JUDGE BECAUSE PETITIONS TO TERMINATE PARENTAL RIGHTS ARE SEPARATE ACTIONS FROM PROTECTIVE AND TEMPORARY CUSTODY HEARINGS ENTITLING RELATOR TO A CHANGE OF JUDGE IN AN ACTION TO TERMINATE PARENTAL RIGHTS SUBSEQUENT TO TEMPORARY AND PROTECTIVE CUSTODY HEARINGS IN ACCORD WITH MISSOURI SUPREME COURT RULES FOR JUVENILE COURT 126.01 IN THAT RESPONDENT FAILED TO SUSTAIN RELATOR’S MOTION FOR CHANGE OF JUDGE FOR THE REASON IT WAS “UNTIMELY BECAUSE THE COURT HAD PRIOR AND CONTINUING JURISDICTION OVER JUVENILES.”

State ex rel. Brault v. Kyser, 562 SW 2<sup>d</sup> 172 (Mo. App. K.C. 1978)

State ex rel. Stublefield v. Bader, 66 SW 3<sup>d</sup> 741 (Mo. banc 2002)

Sections 211.442 through 211.462 R.S. Mo.

Missouri Supreme Court Rules of Civil Procedure 55.01, 55.33

Missouri Supreme Court Rules for Juvenile Court 114, 121, 126



## ARGUMENT

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN JUVENILE CAUSE NUMBERS JU301-0090, JU301-0091 AND JU301-0092, IN THE MATTER OF ROBERT BARTON, SANDRA BARTON AND JEFFREY BARTON, OTHER THAN VACATING HER ORDER OF JUNE 19, 2002 AND SUSTAINING RELATOR'S MOTION FOR CHANGE OF JUDGE BECAUSE MISSOURI SUPREME COURT RULES FOR JUVENILE COURT 126.01 PROVIDES THAT A CHANGE OF JUDGE SHALL BE ORDERED UPON APPLICATION OF A PARTY FILED WITHIN FIVE DAYS AFTER A TRAIL DATE HAS BEEN SET, IN THAT RESPONDENT SET THE PETITIONS TO TERMINATE PARENTAL RIGHTS FOR TRIAL BY ORDER DATED JUNE 17, 2002, RELATOR FILED HIS MOTION FOR CHANGE OF JUDGE ON JUNE 18, 2002 AND RELATOR OVERRULED RELATOR'S MOTION ON JUNE 19, 2002.

Missouri statutes, section 530.010 (1939) and 530.020 R.S. Mo. (as amended 1973) establish this court's authority to hear and grant writs of prohibition to prevent usurpation of judicial power.

Writs of prohibition have been considered the appropriate remedy when a lower court has lacked jurisdiction to proceed or when it has abused its discretion so that it cannot be remedied by appeal, State ex rel. K-Mart Corporation v. Holliger, 986 SW 2<sup>d</sup> 165 (Mo. banc 1999).

When lower courts have exceeded their jurisdiction by failing to sustain a timely filed motion for change of judge, prohibition is appropriate, State ex rel. Raack v. Kohn, 720 SW 2<sup>d</sup> 941 (Mo. banc 1986).

Litigant's right to a change of judge has been considered a "keystone of the judicial system" in a line of cases discussed succinctly in State ex rel. Walters v. Schaepperkoetter, 225 SW 3<sup>d</sup> 740, 742 (Mo. App. E.D. 2000) that have granted Relator's requests for writs of prohibition, noting that Missouri courts have been liberally construing that right.

While most of the cases cited above have dealt with Missouri Supreme Court Rule of Civil Procedure 51.05, this liberal construction of litigant's right to a change of judge has applied to criminal cases, and cases under Missouri Supreme Court Rule of Civil Procedure 92, for temporary and permanent injunctions, State ex rel. Cohen v. Riley, 994 SW 2<sup>d</sup> 546 (Mo. banc 1999).

Relator's request for a change of judge in a juvenile court is governed by Missouri Supreme Court Rule for Juvenile Court 126.01 which provides a change of judge shall be ordered upon application of a party filed within five days after the trial date has been set. It is not disputed that Relator's motion for change of judge was filed one day after the petition for termination of parental right was set for trial.

Relator's case was set for trial in November, 2002. If he were required to wait until that trial date, then receive an unfavorable ruling, his only remedy would be an appeal which would take several more months to perfect. Because

the issue of his case is the parental rights of his children, appeal is not an adequate remedy for him or his children; and, if an appeal were successful, would result multiple trials of the same issue.

Relator respectfully submits the appropriate remedy in this case is to make the preliminary writ of prohibition issued on August 23, 2002, absolute.

## ARGUMENT

II. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE JUVENILE CAUSE NUMBERS JU301-0090, JU301-0091 AND JU301-0092, IN THE MATTER OF ROBERT BARTON, SANDRA BARTON AND JEFFREY BARTON OTHER THAN VACATING HER ORDER OF JUNE 19, 2002 AND SUSTAINING MOTION FOR CHANGE OF JUDGE BECAUSE PETITIONS TO TERMINATE PARENTAL RIGHTS ARE SEPARATE ACTIONS FROM PROTECTIVE AND TEMPORARY CUSTODY HEARINGS ENTITLING RELATOR TO A CHANGE OF JUDGE IN AN ACTION TO TERMINATE PARENTAL RIGHTS SUBSEQUENT TO TEMPORARY AND PROTECTIVE CUSTODY HEARINGS IN ACCORD WITH MISSOURI SUPREME COURT RULES FOR JUVENILE COURT 126.01 IN THAT RESPONDENT FAILED TO SUSTAIN RELATOR'S MOTION FOR CHANGE OF JUDGE FOR THE REASON IT WAS "UNTIMELY BECAUSE THE COURT HAD PRIOR AND CONTINUING JURISDICTION OVER JUVENILES."

As counsel for Respondent stated in her suggestions in opposition to Writ of Prohibition, if an action to terminate parental rights is an independent civil action, Relator is entitled to his change of judge in this action. However, Respondent argues that a petition to terminate parental rights filed after temporary custody proceedings is in the nature of a supplemental petition, not an independent

civil action therefore no change of judge is required under Missouri Supreme Court Rules for Juvenile Court 126.01c.

Rule 126.01 does not set out other actions are not independent civil actions other than supplemental petitions and motions to modify a prior order of disposition<sup>1</sup>. This can be compared to Missouri Supreme Court Rule 51.05(a) which declares motions to modify child custody, child support and spousal maintenance shall not be considered independent civil actions. In Rule 51.05 all these actions request a modification of a previously entered judgment, as does a motion to modify a prior order of disposition. As a petition to terminate parental rights is not an action to modify a previous order of disposition, we must determine whether or not it is a supplemental petition.

Petitions to terminate parental rights are governed by Missouri Supreme Court Rules for Juvenile Court 121, pursuant to Sections 211.442 through 211.462 R.S. Mo. Neither the statutes nor Rule 121.01 provide for supplemental petitions to be filed and likewise do not provide for motions to modify the judgments. However, as the petition to terminate parental rights shall be in the form

<sup>1</sup>Missouri Supreme Court Rules for Juvenile Courts provide in Rule 119.07 that a party may move to amend a judgment and order of disposition of a juvenile under the Juvenile Code. Rule 119.08 provides for periodic review of orders of disposition. Rule 119.09 provides for modification (by motion of a party or the courts' own motion) of judgment and orders of disposition and the entry of a

modified judgment of disposition. It can be argued that the supplemental petition referred to in Rule 126.01c. is a petition filed under Rule 111.07a(2). Rule 111.13 requires petitions for protective custody to be filed before a protective custody hearing and provides for motions to modify protective custody orders. provided by Rule 114.01, amendment may be permitted under Rule 114.02.

Actions to terminate parental rights are established in separate provisions from protective and temporary custody actions in both statutes and rules, each action having its own requirements. Even when children are in jurisdiction of the Juvenile Court under temporary custody orders, the State must file a petition to terminate parental rights and personally serve the required parties, Section 211.453 R.S. Mo.; a separate investigation must be made (in addition to the studies made in the temporary custody action) Section 211.445 R.S. Mo.; and appointment of counsel for parents Section 211.462 R.S. Mo. is required. If termination actions are supplemental petitions, it would not be necessary to require personal service and additional investigations.

Even though decided in 1978, Relator finds State ex rel. Brault v. Kyser, 562 SW 2<sup>d</sup> 172 (Mo. App. K.C. 1978) a good outline of his argument in this case. In that Juvenile Court case, the juvenile office filed a petition for temporary custody and an order was entered. Nearly two years later, the juvenile officer filed a petition to terminate parental rights under the same case number. Trial was held, parental rights were terminated but the termination was reversed in appeal.

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However, during the appeal, the trial court entered an order of adoption in favor of adoptive parents. Mother and Father filed motions in an attempt to regain custody and requested a change of judge in those motions; and the change of judge was granted. Sometime thereafter, the judge to whom the case was assigned retired and a new judge was assigned to the case. After two months had passed, the juvenile officer filed a new petition to terminate parental rights under the original case number and mother filed her second motion for change of judge which was denied.

The issue presented in mother's case was whether or not the petition to terminate parental rights was a separate proceeding from the temporary custody action. Id. p.174. The Missouri Court of Appeals, Kansas City District, found the two actions to be separate after examining chapter 211 R.S. Mo. The Appellate Court found the actions were separated and headed separately in chapter 211, served a different purpose, contemplated different outcomes, and requested a different relief. It concluded the action to terminate parental rights was a, "new and different civil action within the meaning of Rule 51.02(d) (now withdrawn) and permitted fresh application for change of judge" Id. p. 174. Writ of Prohibition was made absolute.

Most recently this court decided a similar case, finding that previous hearings concerning the custody of minor children did not preclude relator from taking a change of judge within five days from the date a "trial" was set in a "protective custody" action, State ex rel. Stubblefield v. Bader, 66 SW 3<sup>d</sup> 741

(Mo. banc 2002). That opinion found temporary custody actions and protective custody actions were not supplemental petitions under Rule 126.01, even though they appear to be more closely related to each other than to termination actions.

Relator urges the plain meaning of supplemental petitions set out in Missouri Supreme Court Rules of Civil Procedure 55.33 apply to Rule 126.01c to limit supplemental pleadings to those “setting for the transactions or occurrences or events that have happened since the date of the pleading sought to be supplemented.”

As the petition to terminate parental rights was given a trial setting on June 17, 2002, Relator’s motion for change of judge was filed June 18, 2002, and denied on June 19, 2002, it was timely filed.



## CONCLUSION

Relator respectfully submits his contention that actions to terminate parental rights are independent civil actions within the context of Missouri Supreme Court Rules for Juvenile Court 126.01, supporting his timely application for change of judge filed after the petition to terminate parental rights was set for trial.

Further, because Respondent denied Relator's motion, she has exceeded her jurisdiction and therefore the preliminary writ of prohibition issued August 23, 2002 should be made absolute.

Relator requests Respondent be directed to sustain Relator's motion for change of judge and take no further action.

### CERTIFICATION

I, Mary J. Lake, Attorney for Relator Christopher Barton certify the following:

This brief contains 234 lines of mono-spaced type, as counted by my word processing computer, which complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).

### CERTIFICATE OF SERVICE

I certify that two copies of this brier and floppy disc containing the brief were hand delivered on September 4, 2002 to counsel for Respondent Theodore R. Allen, Jr., Jefferson County Courthouse, Box 100, Hillsboro, MO 63050.

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AMENDED CERTIFICATION

I, Mary J. Lake, Attorney for Relator Christopher Barton certify the following:

This brief contains 2,645 words, as counted by my word processing computer, which complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).

CERTIFICATE OF SERVICE

I certify that two copies of this brier and floppy disc containing the brief were hand delivered on September 4, 2002 and the amended Certificate of Service on September 5, 2002 to counsel for Respondent Theodore R. Allen, Jr., Jefferson County Courthouse, Box 100, Hillsboro, MO. 63050.

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