Supreme Court of Ohio Clerk of Court - Filed March 15, 2016 - Case No. 2016-0385

IN THE SUPREME COURT OF OHIO
Original Action

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| State ex rel. Kathryn Van Kirk, | ) | |
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| Relator, | ) | |
| | ) | |
| v. | ) | Case No. 2016-0385 |
| | ) | |
| Court of Appeals for the Eighth Appellate District, | ) | |
| | ) | |
| Respondent. | ) | |

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**Memorandum Supporting Complaint of Relator Kathryn Van Kirk for Writ of Prohibition**

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Kathryn Van Kirk
364 Bonniewood Drive
Cleveland, Ohio 44110
*Relator*

Court of Appeals for the Eighth Appellate District
1 Lakeside Avenue #202
Cleveland, Ohio 44113
*Respondent*

# The Supreme Court of Ohio

**original action in prohibition**

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| **State ex rel., Kathryn Van Kirk**, 364 Bonniewood Dr., Cleveland, Ohio 44110, **Relator**, | ( | **Case No. 2016-0385** |
| **vs**. | ( | ***Memorandum* supporting complaint for peremptory & alternative writ of prohibition** |
| **Court of Appeals for the Eighth Appellate District**, 1 W. Lakeside Ave. # 202, Cleveland, Ohio 44113, **Respondent**. | ( | |

## Preliminary statement

Relator adopts the averments of her complaint instead of repeating them here.

## Argument

1. **This Court will issue a writ of prohibition to prevent enforcement of a court of appeals' order when that court patently and unambiguously lacked jurisdiction to issue it.**

The purpose of a writ of prohibition is to "keep inferior courts within the limits of their own jurisdiction." State ex rel. Nolan v. ClenDening, 93 Ohio St. 264, 270, 112 N.E. 1029 (1915).

Where a subordinate court patently and unambiguously lacks jurisdiction, this Court may issue a writ of prohibition to prevent future unauthorized exercises

of jurisdiction and to correct the results of previous unauthorized exercises of jurisdiction. E.g., State ex rel. Buck v. Maloney, 102 Ohio St.3d 250, 253, 2004-Ohio-2590, 809 N.E.2d 20, 23, ¶ 16.

This Court may issue a writ of prohibition where the subordinate court either is absolutely devoid of jurisdiction, or it has jurisdiction of the subject matter but exceeded its authorized powers in exercising it. E.g., E.W. Scripps Co. v. Fulton, 100 Ohio App. 157, 159, 125 N.E.2d 896, 898 (Cuya. App. 1955) (*quoting* Clendening, 93 Ohio St. at 271, 112 N.E. at 1031).

Where a court patently and unambiguously lacks jurisdiction, this Court may issue a writ of prohibition regardless of whether adequate alternative remedies might exist. State, ex rel. Fenwick v. Finkbeiner, 72 Ohio St.3d 457, 459, 650 N.E.2d 896, 898 (1995).

2. **This Court should issue a writ prohibiting respondent from enforcing its order of March 9, 2016, that enjoins relator Kathryn Van Kirk from proceeding with her daughter's surgery set for this Thursday.**

   A. **Courts of appeals have little authority to enjoin anyone.**

Courts of appeals have no authority to enjoin anyone as primary relief. They have no original jurisdiction to issue injunctions, and their appellate jurisdiction is confined to reviewing, affirming, modifying, or reversing final orders of subordinate courts. Ohio Const. Art. IV, § 3.

The only lawful injunctions that courts of appeals can issue are those incidental to protecting their own orders, their original jurisdiction to grant petitions for extraordinary writs, and their appellate jurisdiction to resolve appeals. That ancillary jurisdiction is supposed to preserve the "status quo" as it existed before the subordinate court issued the order that the appellant appealed. See e.g., Copperweld Steel Co. v. Indus. Comm'n, 142 Ohio St. 439, 443, 52 N.E.2d 735, 737 (1944); State ex rel. Ellis v. Bd. of Deputy State Supvrs, 70 Ohio St. 341, 349, 71 N.E. 717, 718 (1904) and syllabus.

Where an appellant casts a request for injunctive relief as merely ancillary to his appeal, but its substance reveals that injunctive relief is his primary aim, the court of appeals has no jurisdiction to grant that relief. See State ex rel. Stevens v. Indus. Comm'n, 102 Ohio App. 47, 50-51, 136 N.E.2d 550, 662-663 (Franklin App. 1955); see gen'lly State ex rel. Smith v. Industrial Comm'n, 139 Ohio St. 303, 306, 39 N.E.2d 838, 839 (1942).

**B. Respondent patently and unambiguously lacked jurisdiction to enjoin Kathryn from exercising her discretion as legal custodian to proceed with her daughter's surgery.**

Michael Moritz moved respondent Court of Appeals on March 9 to stay enforcement of the juvenile court's order of March 8 enjoining Michael's own conduct. (Ex. 9 to relator's complaint – Moritz motion.)

Had Michael satisfied the requirements for a stay, respondent had ancillary jurisdiction to grant it. A stay of the order enjoining Michael would have preserved the status quo as it existed before the lower court restrained him. A stay would free Michael, during his appeal, to engage in conduct that the juvenile court had barred.

But respondent had no ancillary jurisdiction to go beyond staying the lower court's order restraining Michael by affirmatively enjoining Kathryn. Enjoining her did not preserve the status quo. It destroyed the status quo. The status quo was—and always had been—that Kathryn would go to Florida with her daughter for this week's scheduled surgery.

Kathryn's fundamental role as Olivia's legal custodian has never come before respondent for appellate review, yet respondent usurped her vital role without even giving her a chance to be heard. And respondent did so, through two judges, without identifying any authority to support any jurisdictional power to enjoin her.

This Court immediately should grant either a peremptory or alternative writ to bar respondent from enforcing its patently and unambiguously *ultra vires* restraint of Kathryn.

3. **This Court should issue a writ prohibiting respondent from enforcing its *sua sponte* order of March 10, 2016, directing the juvenile court to resolve a motion pending before that court and that never was before respondent.**

Respondent also did not identify any authority for its asserted jurisdiction to interfere *sua sponte* with the juvenile court's process of adjudicating Michael Moritz' motion to undo Kathryn's longstanding status as her daughter's legal custodian. (Exhibit 3 to complaint – March 10 order.)

Respondent has original jurisdiction to issue a writ of procedendo to a lower court, requiring it to proceed to resolve a matter pending before that lower court. Ohio Const. Art. IV, § 3(B)(1)(e).

But respondent can't invoke that original jurisdiction by itself. Someone with standing has to file a formal complaint to invoke that original jurisdiction. E.g., S.Ct.Prac.R. 12.02(A)(1); Eighth Dist. L. App. R. 45(B).

Moreover, even where someone has properly invoked an appellate court's original jurisdiction in procedendo or mandamus, the court has no power to use that jurisdiction to control judicial discretion. E.g., State ex rel. Fontanella v. Kontos, 117 Ohio St. 3d 514, 515, 2008-Ohio-1431, 885 N.E.2d 220, 222, ¶ 7.

Respondent's March 10 order amounts to a *de facto*, *sua sponte* writ of procedendo or mandamus, but with no original jurisdiction to issue it. When Michael Moritz appealed the juvenile court's order of March 8 restraining him, his

notice of appeal did not give respondent plenary power to inject itself into any matter pending before the juvenile court, as respondent did on March 10.

This Court, therefore, should rule that respondent patently and unambiguously lacked jurisdiction to order the juvenile court to hold an evidentiary hearing on the motion pending before that lower court, or to do anything else with that motion. So this Court should issue an immediate writ of prohibition—peremptory or alternative—barring respondent from enforcing its *sua sponte* March 10 order.

## Conclusion

Because respondent patently and unambiguously lacked jurisdiction to issue the orders challenged here, this Court should issue an alternative writ of prohibition, or a peremptory writ of prohibition that bars respondent Court of Appeals from:

- enforcing its March 9 restraint of relator Kathryn Van Kirk, freeing her to proceed with her daughter to Florida for this week's scheduled surgery;
- directing the juvenile court's process of adjudicating the motions pending before it, including the motion to alter the juvenile court's parenting order, which is the subject of respondent's March 10 order; and
- otherwise enforcing respondent's March 10 order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Under Rule 12.02 (A)(2) of the Supreme Court Rules of Practice, the Clerk of the Supreme Court may serve a copy of the memorandum supporting the complaint, along with the complaint and summons upon the respondent. Nevertheless, the undersigned has served a courtesy copy on this 15th day of March, 2016, to Sarah Pierce, Attorney General of Ohio's Office, email attention to: cathy.kirby@ohioattorneygeneral.gov. and also to Kevin Cronin, attorney for non-party Michael Moritz, the father of Olivia Moritz at kevin@kevincronin.us (tel: 216/377-0615) (Attorney Reg. 0039891).

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