**IN THE OHIO SUPREME COURT**

| | |
|---|---|
| STATE ex rel. DAIL DEBRUYNE,<br><br>Relator,<br><br>vs.<br><br>LUCAS COUNTY COURT OF COMMON PLEAS,<br>Juvenile Division, et al.,<br><br>Respondents. | S.C. Case. No. 2018-0941<br><br>Lucas Co. Court Case No. 18267086<br><br>ORIGINAL WRIT IN PROHIBITION |

---

# MERIT BRIEF OF RELATOR, DAIL DEBRUYNE

---

Karin L. Coble
Law Office of Karin L. Coble
316 N. Michigan Avenue
Suite 600
Toledo, OH 43604
(888) 268-3625
karin@toledolegalresource.com

*Attorney for Relator, Dail DeBruyne*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes**



**Cases**

## SUMMARY OF ARGUMENT

This matter involves children who resided in Michigan, whose Mother passed away, whose Father (Relator) resided in Michigan, and whose custody was already determined by a Michigan court. Upon Mother's death, the children's maternal aunt, Heather Koziarski, undisputedly removed the children from Michigan without the knowledge or consent of Father, took them to Ohio, and petitioned Respondents for emergency custody of the children.

Respondents improperly exercised temporary, emergency jurisdiction in the exact same way as in *State ex rel. V.K.B. v. Smith*, 138 Ohio St. 3d 84, 2013-Ohio-5477, and granted Koziarski temporary custody. For the last 10 months, DeBruyne, the surviving parent with custody, has only seen his children two hours per month, supervised, due to Respondents' orders.

Michigan law is clear that no third-party custody action can lie in Michigan if a child has a surviving parent. M.C.L. § 722.26c. The third-party complainant had to proceed in Ohio with her third-party complaint for custody, because she could not proceed in Michigan.

DeBruyne prays this Court prohibit Respondents from facilitating this end-run around the UCCJEA and vacate Respondents' orders forthwith for lack of subject-matter jurisdiction.

## RELEVANT FACTS

Relator DeBruyne and his now-deceased wife, Ann Sahadi, were divorced in Michigan in 2013. See Exhibit A; DeBruyne Affidavit, ¶ 1, 3. Respondents admit that the Michigan divorce decree was submitted during proceedings below. Answer, ¶ 23; Exhibits C and I. Relator and Sahadi were granted joint legal custody of the children. Exhibit A, C.

In January 2017, Sahadi moved with the children to Ohio, and she and Debruyne continued to have joint legal custody of the children. In August 2017, Sahadi returned with the children to Michigan and resided near DeBruyne. Also in August 2017, Sahdi and DeBruyne filed a consent order significantly expanding DeBruyne's visitation with the children. Exhibit C. DeBruyne saw his children daily and several nights per week they stayed overnight. DeBruyne Affidavit, ¶ 7-8.

On January 26, 2018, Sahadi and DeBruyne were in an accident. Sahadi died and DeBruyne was seriously injured. Exhibit D; DeBruyne Affidavit, ¶ 2, 9. While DeBruyne lay in a hospital with a traumatic brain injury, Heather Koziarski came to Michigan and took the children to Ohio without DeBruyne' s knowledge or consent. Exhibit E, p. 22-23; DeBruyne Affidavit, ¶ 9-10. One day before DeBruyne was released from the hospital, Koziarski filed an *ex parte* emergency petition for custody with Respondents. Exhibit G. Respondent Magistrate Nedal Adaya

held an emergency hearing on February 13, 2018, and issued an order granting Koziarski emergency temporary custody. Exhibit H.

The temporary custody order specifically found that the children resided in Michigan. *Id.* Respondents knew as soon as February 2018 that DeBruyne lived in Michigan and knew that the children's custody had been determined by a Michigan court. Exhibit E, p. 25; Exhibit I; Exhibit K.

DeBruyne objected to Respondents' exercise of subject-matter jurisdiction. Exhibit I. On April 4, 2018, Respondent Magistrate issued an order, finding that DeBruyne and Sahadi, had been married, had lived in Michigan, that a Michigan court had entered a judgment of divorce, that the children were resident in Michigan, yet finding held that Ohio had jurisdiction over Koziarski's request for custody. Exhibit K.

DeBruyne again objected, filing a copy of the Michigan judgment of divorce (Exhibit A), the Michigan consent order (Exhibit C), and Sahadi's Michigan lease (Exhibit B). Respondent Judge Connie Zemmelman affirmed the magistrate's order. Exhibits M, N.

DeBruyne was not permitted to see his children from the January accident until Respondents order on May 7, 2018, which granted him visitation with the children "at the discretion of the GAL." Exhibit O. DeBruyne visits with his children for one hour, twice per month, during

counseling sessions, pursuant to the GAL and Respondents' order. DeBruyne Affidavit, ¶ 22.

When DeBruyne filed this Complaint in Prohibition, Koziarski's third-party custody complaint was still pending, and only a pretrial had been set, for September 2018. Exhibit O, Q. No trial date or date of final determination had been set as of the date this Complaint was filed.

Respondents' docket in this matter (Exhibit Q) and the docket of the Monroe County, Michigan divorce and custody case (Exhibit R) both show that Respondents did not contact the Michigan court pursuant to the interstate emergency, temporary custody rules of the UCCJEA.

## ARGUMENT

### I. Relator is entitled to a Writ of Prohibition because Respondents clearly and unambiguously lack jurisdiction pursuant to the UCCJEA.

Respondents purported to exercise jurisdiction pursuant to R.C. 3127.18, the temporary emergency jurisdiction provision of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") as adopted in Ohio, in R.C. Chapter 3127. Respondents also found subject-matter jurisdiction, concluding that Ohio is the children's "home state" pursuant to the UCCJEA. Neither ground exists, and Respondents clearly and unambiguously lack subject matter jurisdiction in this matter.

### A. Relator has full legal custody of his children pursuant to Michigan law and Michigan retains exclusive continuing jurisdiction over the children.

Relator has legal custody of his children pursuant to a Michigan divorce decree. Exhibit A. *Justis v. Justis*, 81 Ohio St.3d 312, 314, 691 N.E.2d 264 (1998), quoting *Loetz v. Loetz*, 63 Ohio St.2d 1, 2 (1980).

Pursuant to Michigan law, when a divorce judgment grants joint legal custody, and the parent with physical custody dies, the parent having joint legal custody automatically gains full legal and physical custody rights. *Bowie v. Arder*, 441 Mich. 23, 490 NW2d 568 (1992); *Deschaine v. St. Germain*, 671 N.W.2d 79 (Mich. Ct. App. 2003). "[T]he custody rights of the father had never been taken away – he retained joint custody as an operation of law, and thus received full custody upon the mother's death." *Phillips v. Phillips*, Michigan Ct. App. No. 191558, 1997 WL 33349410, *2, explaining *Bowie*.

Respondent Magistrate was informed at the *ex parte* hearing that Sahadi and DeBruyne had been divorced in a Michigan court. Yet the magistrate wanted to keep the children in her "grasp," even while the magistrate admitted that Michigan originally had jurisdiction: "[Michigan has] jurisdiction of the children through a divorce. That's clear. Does jurisdiction change since they have been back in Ohio for six

months and not back in Michigan for six months?" Exhibit E, 2/13/18 hearing, p. 42.

Respondent magistrate seemed to think that DeBruyne had to take some affirmative action upon Sahadi's death to obtain legal custody: "Mr. DeBruyne hasn't filed a motion anywhere to do anything. So even if this court didn't have jurisdiction, the question would be, where would we ship it to? Do we ship it to nowhere? There is nothing else out there. * * * I know in Ohio that would require going back to our domestic relations court and saying, hey, look, mom was awarded legal custody in the divorce and she has since passed away, and so I need the legal custody determination. But I don't know how Michigan does it." Exhibit J, 3/29/18 hearing, p. 6, 19.

Pursuant to applicable Michigan law, DeBruyne did not need to take any affirmative steps upon Sahadi's death – DeBruyne already had full legal custody of his children pursuant to the Michigan divorce decree. DeBruyne's counsel attempted to explain this to Respondents, to no avail. Exhibit J, p. 14,

When a state has issued custody orders, that state retains exclusive, continuing jurisdiction. MCL 722.1202; R.C. 3127.16; R.C. 3127.01(B)(3). Respondents should have known this as early as the Feb-

ruary 13, 2018 *ex parte* hearing. Michigan has exclusive continuing jurisdiction pursuant to the divorce decree as long as: (1) Michigan still had jurisdiction as a matter of state law and (2) Michigan "remain[ed] the residence of the child or of any contestant." 28 U.S.C. 1738A(d); *State ex rel. Garrett v. Costine*, 153 Ohio St. 3d 29, 2018-Ohio-1613, ¶ 14.

The UCCJEA's exclusive and continuing jurisdiction provisions require, in order for Ohio to properly have subject-matter jurisdiction after Michigan has issued a child custody determination, that either the Michigan or Ohio court determine that (1) the child/ren do/es not live in the state, plus and added to a finding that (2) the child/ren's parent and a person acting as parent also does not reside in the state. In other words, three persons or classes of persons must all no longer "reside" in Michigan, the state with continuing jurisdiction.

"[W]hen at least one of the parents still resides in the state that made the original custody determination, that state has exclusive, continuing jurisdiction to modify its own order." *S.D. v. K.H.*, 8th Dist. No. 105244, 2018-Ohio-1181, ¶ 7. Exclusive continuing jurisdiction is in Michigan solely because DeBruyne continues to reside there. Additionally, however, none of the three classes of persons in the statute resided in Ohio. Sahadi resided in Michigan at the time of her death, and the children "resided" in Michigan because DeBruyne automatically gained

legal custody upon Sahadi's death. Therefore, Michigan has exclusive, continuing jurisdiction.

Respondents applied the "home state" rule of the UCCJEA. The "home state" rules only apply in an "initial custody determination." See *Rosen v. Celebrezze*, 117 Ohio St. 3d 241, 245, 2008-Ohio-853, ¶ 23. Respondents are clearly incorrect. The "home state" rule simply does not apply, because Michigan issued the original custody orders, and Michigan retains exclusive and continuing jurisdiction.

**B. Respondents failed to follow the mandatory procedures of the UCCJEA.**

Respondents did not properly follow the procedures of the UCCJEA to invoke temporary emergency jurisdiction in Ohio pursuant to R.C. 3127.18(A)(2) and *State ex rel. V.K.B. v. Smith*, 138 Ohio St. 3d 84, 2013-Ohio-5477. Specifically, (1) Respondents failed to communicate with the Michigan court which entered the divorce decree when it purportedly exercised temporary emergency jurisdiction, and (2) Respondents put no time limit on the temporary custody orders.

In *Smith*, this Court reversed the Sixth District's denial of a writ of prohibition. *Smith* held that temporary emergency jurisdiction does not exist if the court does not first communicate with the court of another state which has already exercised jurisdiction over a child:

> "Thus, the juvenile court has emergency and temporary jurisdiction over a child in Ohio only if it satisfies the requirements of the statute. One of the requirements of the statute is that if a child-custody proceeding has been started in another state, the court must immediately communicate with the court of the other state to resolve the emergency, protect the safety of the parties and the child, and set a period for the duration of the temporary order. R.C. 3127.18(D) mandates that when
>
> '[a] court of this state * * * has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in or a child custody determination has been made by a court of a state having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state, [the Ohio court] *shall immediately communicate with the other court*.'
>
> (Emphasis sic.)

As in *Smith*, "The situation before us today is precisely the situation the Uniform Act contemplates." *Id*. at ¶ 13. In *Smith*, a mother, V.K.B., had sole custody of her child and lived in Arizona from 2009 to 2012. The mother visited Ohio temporarily, was called back to Arizona, and left the child in the temporary custody of her mother, the child's maternal grandmother. While V.K.B. was in Arizona, the child's grandfather filed for temporary emergency custody, and the Sandusky County, Ohio court granted it.

The Ohio Supreme Court reversed the Sixth District because "the juvenile court has failed to follow the statute that creates its jurisdiction

over the child * * * ." *Id.* at ¶ 4. Likewise, Respondents also failed to follow the UCCJEA's temporary emergency jurisdiction requirements.

First, Respondents were required to, and did not, communicate with the Michigan court regarding the temporary order. Respondents were given the Michigan divorce decree at least by March 29, 2018, at the magistrate's hearing. Therefore, Respondents were "informed" of the Michigan judgment pursuant to R.C. 3127.18(D). Exhibit J, 3/29/18 transcript, p. 5. At that point, Respondents knew that "a child custody determination has been made by a court of a state having jurisdiction." Respondents were then required to "immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order." R.C. 3127.18(D).

The evidence demonstrates that Respondents did not contact the Michigan court. The certified docket of this matter (Exhibit Q) and the certified docket of the Michigan court (Exhibit R) do not show any communications between Respondents and the Michigan court which had jurisdiction over the children.

Second, the evidence demonstrates that Respondents did not determine a period of duration for the temporary order. "[A]ny order issued by a court of this state under this section must specify in the order

a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state * * *." R.C. 3127.18(C).

None of Respondents' "temporary" orders contains a duration for the order. Indeed, these "temporary" orders have been in effect since February 2018, and have worked to deprive DeBruyne any basic parental visitation with his children.

As in *Smith*, "the juvenile court has awarded 'temporary custody' but has neither communicated with the [Michigan] court nor specified the duration of the temporary order to allow the [Michigan] court to rule." *Smith* at ¶ 22.

**C. Respondents had no factual basis to find emergency jurisdiction.**

Respondent Magistrate checked a box in a form order, which states that the children are "subjected to or threatened with mistreatment or abuse." Exhibit H. R.C. 3127.18(A)(2). However, the magistrate's findings of fact do not state that the children are subjected to or threatened with mistreatment or abuse, and does not state a factual basis for the finding. DeBruyne argues that the facts do not show that his children were subjected to or threatened with mistreatment or abuse.

At the *ex parte* hearing on the *ex parte* petition, DeBruyne's oldest step-son, Gabriel Browning, age 18, testified to an incident from January 2017 – 13 months prior to the *ex parte* petition.

Browning lived with Sahadi and DeBruyne in January 2017 in Michigan; A.M.D. and T.J.D are his half-siblings Browning testified that he was in the basement, and heard, "above his head," a dispute between Sahadi and DeBruyne. They were arguing and DeBruyne had "kicked [Sahadi] out." Sahadi tried to get back in the house to get her keys, and A.M.D. let her in. DeBruyne then physically "roughed them up." 2/13/18 hearing transcript, p. 10.

After that, Sahadi moved to Ohio with the children. However, in August 2017, eight months later, Sahadi signed the lease agreement to move to Michigan, only a few miles from DeBruyne's house. *Id*., p. 12; Exhibit B.

Once they returned to Michigan, DeBruyne and the children saw each other frequently, "quite a bit," according to Browning. *Id.,* p. 13. DeBruyne and the children saw each other "pretty regularly." *Id*., p. 16. Sahadi voluntarily consented to expanded visitation time for Relator in August 2017 – in a Michigan court. Exhibit C. In fact, A.M.D. and

DeBruyne talk on the phone and text each other "regularly" since Koziarski took the children. 2/13/18 hearing transcript, p. 16. The last physical incident had been "a year or two" prior to January 2018. *Id.*

One allegation of a physical altercation, occurring over 13 months prior to the petition for temporary emergency custody, does not support Respondents' finding that the children need to be protected from "immediate or threatened physical or emotional harm" as required by the UCCJEA.

In fact, since the 13-month prior domestic incident, Sahadi returned to Michigan to live "three to five miles" away from DeBruyne, voluntarily agreed to expanded visitation for DeBruyne in a Michigan court, where DeBruyne and the children saw each other frequently and regularly. DeBruyne presents no "immediate or threatened" harm to his children.

**D. Relator has no adequate remedy at law.**

"[N]atural parents have a fundamental constitutional interest in the care, custody, and management of their children that [third parties] do not. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 40." *Smith*, 2013-Ohio-5477, ¶ 21-22. Although DeBruyne has filed a direct appeal, a Writ of Prohibition can still issue.

A direct appeal is not adequate in this circumstance – where a non-parent has taken children from a parent with legal custody in Michigan and an Ohio court improperly exercised jurisdiction over the children.

> DeBruyne meets the requirements for a writ in prohibition: (1) respondents are about to or have exercised judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of law. When the lack of jurisdiction is "patent and unambiguous," the lack of an adequate remedy is considered established, as the unavailability of alternate remedies is immaterial in such a case.

*Smith*, 2013-Ohio-5477, ¶ 9 (internal citations omitted).

*Smith* stated four requirements for when a direct appeal is not an adequate remedy, and DeBruyne meets them all:

> (1) custody has been removed from a parent who previously had been awarded permanent custody, (2) custody is awarded to a nonparent in an ex parte proceeding, (3) the juvenile court is not complying with the requirements of the Uniform Act or other applicable law, and (4) the juvenile court has issued a 'temporary' order with no indication of

> when a hearing or other action might be taken to resolve the case, appeal is not an 'adequate remedy at law' for purposes of an extraordinary writ."

DeBruyne has full permanent custody of his children by virtue of the Michigan court orders and Michigan law. Respondents awarded custody to a third-party nonparent in an *ex parte* proceeding. Respondents did not comply with the UCCJEA's provisions for emergency temporary custody by not contacting the Michigan court and not setting a time limit on its orders. The nonparent has had "temporary" custody for over ten months, a petition for full custody is pending, and nothing indicates when the case might be resolved.

As in *Smith*, DeBruyne has been without his children for almost a year, and "that year can never be replaced. If a writ is not issued and the case returned to the juvenile court in these circumstances, it may languish for one or two more years before the court issues an appealable order. The appeal can take an additional year or two by the time briefs are prepared and oral arguments delivered and the judges arrive at a conclusion." *Smith* at ¶ 23.

DeBruyne respectfully submits that he has met this Court's requirements for a writ of prohibition pursuant to *Smith*.

**E. Conclusion.**

Relator prays that this Court issue a Writ of Prohibition to restrain Respondents from exercising jurisdiction over his children, vacate all orders issued by Respondents in this case to date as void, and order the children returned to his custody in Michigan.

Respectfully submitted,

_/s/ *Karin L. Coble*
Karin L. Coble

Counsel for Relator, Dail DeBruyne

CERTIFICATE OF SERVICE

I certify that on October 26, 2018, a copy of the foregoing was mailed via email to:

John Borell, Esq.
Lucas County Prosecutor's Office
Civil Division
711 Adams, Second Floor
Toledo, OH 43604

Counsel for Respondents

*/s/ Karin L. Coble*
Karin L. Coble
Counsel for Relator