

**IN THE SUPREME COURT OF MISSOURI**

STATE OF MISSOURI <i>ex relatione</i>	)	
KELSEY KOEHLER,	)	Case No. SC_____
Relator,	)	
	)	
vs.	)	Missouri Court of Appeals,
	)	Western District,
	)	Case No. WD83371
HON. SANDRA MIDKIFF,	)	
<i>in her official capacity as</i>	)	
Circuit Judge, Circuit Court of	)	Circuit Court of Jackson County
Jackson County,	)	Case No. 1916-FC05957
Respondent.	)	

**PETITION FOR WRIT OF PROHIBITION  
AND SUGGESTIONS IN SUPPORT**

Relator Kelsey Koehler requests the Court under Mo. Const. art. V, § 4, Chapter 530, R.S.Mo., and Rules 84.22, *et seq.*, and 97, to issue a writ of prohibiting Respondent Judge Midkiff from enforcing her order of October 29, 2019 giving the respondent below temporary sole legal and sole physical custody of the parties’ child during the proceedings or her order of November 12, 2019 denying the relator’s motion to set the October 29 order aside, and from doing anything other than vacating both of those orders.

The relator additionally moves the Court under Rule 84.24(e) to dispense with Rule 84.24(c)-(d)’s time limits and issue a preliminary writ or “stop order” immediately. The trial court’s orders at issue are not appealable and govern the custody of the parties’ child for the foreseeable future. Local Rule 30.

In support, the relator states:

## Summary

Section 452.380.1, R.S.Mo., requires a hearing on any contested motion for temporary custody in a dissolution of marriage action. In *Hermelin v. Hermelin*, 766 S.W.2d 670, 672 (Mo. App. 1989), the Court of Appeals held an order granting such a motion without a hearing violates this statute and automatically is reversible error, reversing just such an order for this reason.

At the same time, a contested temporary custody order entered without notice or an opportunity for a full evidentiary hearing also violates the contesting parent's right to due process, guaranteed in Mo. Const. art. I, § 10, and U.S. Const. Amend. XIV. For this reason, in *State ex rel. Milner v. Carlton*, 223 S.W.3d 896, 898-99 (Mo. App. 2007), the Court of Appeals issued a permanent writ vacating just such an order for this reason.

In this case, Mother and Father each requested temporary custody of their minor son, each denied the other's allegations and contested the other's motion, and Mother expressly requested a hearing. Nonetheless, the trial court granted Father's contested motion for temporary custody and awarded him sole legal and sole physical custody of Son during the case. This was done without any notice to Mother or opportunity for Mother to be heard. Instead, and as the trial court put it, it was done solely on the basis of "motions [and] affidavits in support" (Ex. 60).

The law of Missouri is that giving Father sole custody of Son without any opportunity for a hearing and without the presentation of any evidence exceeded the court's authority and was error. As in *Milner*, which is directly on point, this Court's writ now lies to remedy that error.

## Statement of Facts

Kelsey Koehler (“Mother”) and Ryan Koehler (“Father”) were married in 2016 (Ex. 10, 20).<sup>1</sup> One unemancipated minor child, [REDACTED] (“Son”), presently two years old, was born of the marriage (Ex. 10, 20).

In July 2019, Mother filed a petition for dissolution of the marriage in the Circuit Court of Jackson County (Ex. 1, 9). The Honorable Sandra Midkiff, Circuit Judge, is the judge assigned to the case (Ex. 1). Father answered Mother’s petition and also filed his own counter-petition for dissolution, which Mother answered (Ex. 20, 29, 48).

Along with her petition, Mother also moved the trial court under § 452.380, R.S.Mo. for an order of temporary custody (Ex. 14). Mother’s motion was verified by her notarized signature under oath (Ex. 19).

Mother alleged that Father had committed domestic violence against her, and recounted an episode in which after consuming alcohol at home with Father and the two of them getting into an altercation, she fled with Son to her father’s home, but was pulled over after ten blocks on Father’s call to the police, and ultimately was charged with driving under the influence of alcohol (Ex. 15-16). She alleged Son then was delivered to Father, who since had not let her see Son, but who was living in a situation not suitable for Son (Ex. 16-17). Despite all this, Mother requested the court order temporary joint physical and legal custody of Son during the remainder of the case (Ex. 17). She asked the court hold a hearing on her motion (Ex. 17).

---

<sup>1</sup> Per Rule 97.03, the attached exhibits are consecutively paginated and an index is included. “Ex. X” refers to page X of the collective exhibits.

In a verified response in late July, 22 days later, Father denied many of Mother's allegations and asked the court to deny Mother's motion for temporary custody (Ex. 24-26). In late July, Father also filed his own verified motion for an order of temporary custody under § 452.380 (Ex. 37). He also referred to § 452.755.1, R.S.Mo., a statute giving courts "temporary emergency jurisdiction" of children in this state who are abandoned or must be protected due to mistreatment or abuse (Ex. 38). Unlike Mother, Father requested the court award him temporary sole legal and sole physical custody of Son during the case (Ex. 37). He alleged Mother was an alcoholic, left Son alone, drove intoxicated with Child, was charged with driving under the influence of alcohol for driving intoxicated with Son, and Mother was under the care of a psychiatrist (Ex. 38-39).

Mother responded ten days later in early August, denied Father's allegations, and asked the court to dismiss his motion for temporary custody, and to proceed instead on her motion for temporary custody (Ex. 45-46). Her response was verified by her notarized signature under oath (Ex. 47).

Through new counsel, in early September Mother then filed a supplement to her motion for temporary custody, stating that she now was requesting sole legal and sole physical custody of Son during the rest of the case (Ex. 53). That supplemental also was verified by Mother's notarized signature under oath (Ex. 59).

Mother requested an "immediate hearing" on her motion (Ex. 54). She made new allegations that she had obtained a full order of protection against Father, Father responded by terminating her communication with Son, Son

told her he was scared of Father, Father had denied her access to Son's medical care and had told medical personnel and others that he had sole custody of Son, and Father had cancelled her visitation with Son (Ex. 54-56). Father did not file any response to this supplement (Ex. 3-6). No hearing was held on any of the motions for temporary custody (Ex. 3-6).

On October 29, the trial court issued an order granting Father's motion for temporary custody and giving him sole legal and sole physical custody of Son during the case and giving Mother only supervised visitation (Ex. 60, 62). It stated it did this "having considered the motions, affidavits in support thereof" (Ex. 60). It did not state any of the factors in § 452.375.2, R.S.Mo., or make any findings as to any of those factors (Ex. 60-63). It also ordered Mother to pay Father \$1,729 per month in child support, paid semi-monthly (Ex. 61, 63). It attached a parenting plan Father had submitted, which it ordered the parties to follow (Ex. 64-71).

Mother then moved on November 6 to set aside the October 29 order (Ex. 72). She pointed out that while a hearing initially had been scheduled on the motions for temporary custody for November 8, the trial court had granted the motion before then, without a hearing and without notice to her, despite the fact that it was contested (Ex. 73-74). She argued the court had no authority to enter a temporary custody order without a hearing and the presentation of evidence, and the parties' pleadings were not evidence (Ex. 74-75). She argued the court had no authority to enter the order without notice, either (Ex. 74-75). She requested the court set aside the October 29 order and set the issue of temporary custody for a hearing (Ex. 75).

Father opposed Mother's motion to set aside (Ex. 77). He argued that under Jackson County Local Rule 33.5, the trial court could rule on any motion after ten days without a hearing, regardless of what the matter concerns (Ex. 77-78). He argued that "[a]t no time was the Court required to hold any hearing prior to entering its Temporary Custody Order" (Ex. 78).

On November 12, in a pretrial order the trial court addressed Mother's motion to set aside by keeping the October 29 order for temporary custody in place but directing the parties to try to arrive at a stipulated modification of it (Ex. 80). It stated,

IT IS FURTHER ORDERED that the parties through their counsel shall work with the Guardian Ad Litem to arrive at a stipulated modification of the Order Granting Respondent's First Amended Motion for Temporary Custody entered herein on October 29, 2019. The parties, counsel and GAL shall work together to consider and arrive at a mutually agreeable modification of the court's order, to include parenting time for the Petitioner on terms, conditions and times that are in the child's best interest over the coming holidays and time period between now and the final judgment or further orders on temporary custody herein. The parties are encouraged to submit a proposed Modification of the Order for Temporary Custody, by agreement of both parties and the GAL.

(Ex. 80).

Mother then filed a petition for writ of prohibition in the Missouri Court of Appeals, Western District, on November 27, 2019, seeking the same relief she seeks in this petition. The Court of Appeals denied her petition January 7, 2020 (Ex. 83).

This petition follows.

## Reasons Why the Writ Should Issue

- I. The trial court's order granting Father's contested motion for temporary sole legal and sole physical custody of Son during the remainder of the proceedings below, entered without any notice or opportunity for hearing to Mother, violated § 452.380.1, R.S.Mo. and Mother's right to due process guaranteed in Mo. Const. art. I, § 10 and U.S. Const. Amend. XIV.**

The law of Missouri is that when a request for temporary custody of a child during a dissolution of marriage proceeding is contested, a trial court has no authority to grant that request without notice of its doing so and an opportunity for the contesting party to be heard. The plain language of the temporary custody statute, § 452.380.1, R.S.Mo., expressly requires such a hearing if there is any objection to a motion for temporary custody, and the failure to hold one is automatic reversible error. *Hermelin v. Hermelin*, 766 S.W.2d 670, 672 (Mo. App. 1989) (reversing order entered without hearing). And a contested temporary custody order entered without notice or hearing also violates the contesting parent's right to due process, guaranteed in Mo. Const. art. I, § 10, and U.S. Const. Amend. XIV. *State ex rel. Milner v. Carlton*, 223 S.W.3d 896, 898-99 (Mo. App. 2007) (issuing writ vacating order entered without notice or hearing).

Here, the trial court granted Father's contested motion for temporary custody and awarded him sole legal and sole physical custody of Son during the case without any notice or opportunity for Mother to be heard, solely on the basis of "motions [and] affidavits in support" (Ex. 60). This exceeded the court's authority and was error. As in *Milner*, which is directly on point, this Court's writ now lies to remedy that error.

**A. Section 452.380.1, R.S.Mo., requires a hearing on any contested motion for temporary custody, and an order granting such a motion without a hearing is automatic reversible error.**

Father and Mother each brought their respective motions for temporary custody orders under § 452.380.1, R.S.Mo. (Ex. 14, 37). That statute provides, “A party to a custody proceeding may move for a temporary custody order. The motion must be supported by an affidavit. **The court may award temporary custody after a hearing or, if there is no objection, solely on the basis of the affidavits.**” (Emphasis added).

Therefore, by this statute’s plain language, it is well-established that if any party objects to a motion for temporary custody, the trial court *must* hold a hearing and is not authorized to issue a temporary custody order without one. *Hermelin*, 766 S.W.2d at 672. “[T]he statute requires the court to hold a hearing prior to awarding custody if there is an objection.” *Id.*

This makes sense. To determine child custody where it is contested, a trial court only may do so by the receipt of admissible evidence in a full hearing at which the parties have the opportunity to engage in cross-examination. *Flickinger v. Flickinger*, 494 S.W.2d 388, 394 (Mo. App. 1973), *abrogated on other grounds by In re Marriage of Hendrix*, 183 S.W.3d 582, 592 n.9 (Mo. banc 2006). But “[a]llegations are not evidence” and “are not self-proving.” *Reno v. Reno*, 461 S.W.3d 860, 866 (Mo. App. 2015) (citation omitted); *see also State v. Lewis*, 536 S.W.3d 787, 794 (Mo. App. 2017) (“allegations in a motion are not self-proving”). Even sworn affidavits are not evidence and are not self-proving. *Regions Bank v. Alverne Assocs.*, 456 S.W.3d 52, 57 (Mo. App. 2014).

Therefore, granting a contested request for temporary custody during a hearing without a hearing violates § 452.380.1 and is reversible error. In *Hermelin*, during a dissolution of marriage, the mother moved for temporary custody of the parties' child. 766 S.W.2d at 671. The trial court refused to hear evidence from the father, stating "that it would not try the custody issue at that time but would instead handle the custody matter at the dissolution proceeding." *Id.* Instead, it just granted the mother's motion and awarded her "primary custody"<sup>2</sup> during the proceedings. *Id.* at 672.

The father appealed<sup>3</sup> and the Court of Appeals reversed. *Id.* After quoting § 452.380.1, the Court of Appeals held that "the statute requires the court to hold a hearing prior to awarding custody if there is an objection," and "[c]learly husband was objecting to awarding custody without a hearing .... Therefore the trial court erred in awarding wife temporary custody without a hearing where husband objected ...." *Id.*

Here, each party filed a proper motion for temporary custody under § 452.380.1 supported by affidavit (Ex. 14, 37, 53). Each party then objected to the other's motion for temporary custody, also supported by affidavit, denied the operative facts in the other's motion, and then requested that the other's motion be denied (Ex. 24-26, 45-46). Moreover, given this, Mother repeatedly asked for a hearing on the issue of temporary custody (Ex. 17, 54).

---

<sup>2</sup> That is an outdated term that this Court later abolished. See *Hendrix*, 183 S.W.3d at 585 n.2.

<sup>3</sup> It is unclear how the father in *Hermelin* was able to appeal this order. As explained *infra* at p. 16, numerous decisions hold that temporary custody orders are not appealable. It just appears that no one in *Hermelin*, including the Court of Appeals, questioned the appealability of the decision.

That the parties' affidavits were by verification of the motions and responses, rather than by separate attached affidavits, makes no difference. The law of Missouri is that when a motion is verified, it is "not necessary ... to annex to the motion a separate affidavit attesting to the truth of" it in order to meet a statutory or rule requirement to support it by affidavit. *State ex rel. Wesolich v. Goeke*, 794 S.W.2d 692, 696 (Mo. App. 1990) (citing *La Grange Elevator Co. No. 111 v. Richter*, 129 S.W.2d 22, 24-25 (Mo. App. 1939)) (granting writ on this basis); *see also Martin v. State*, 526 S.W.3d 169, 182 (Mo. App. 2017) ("Verification of an application will substitute for the requirement to annex an affidavit").

Nonetheless, as in *Hermelin*, the trial court granted Father's motion for temporary custody without a hearing at all, instead only "having considered the motions, affidavits in support thereof" (Ex. 3-6, 60). This is worse than in *Hermelin*, where at least the trial court had the parties in open court and allowed the contesting spouse to make an offer of proof. 766 S.W.2d at 671. Conversely, here, all there was before the trial court were motions and responses containing disputed allegations, which are not evidence and furnish no evidentiary basis for the trial court to make its decision.

Therefore, as in *Hermelin*, the trial court violated § 452.380.1 in granting Father's contested motion for temporary sole legal and sole physical custody of Son, exceeding its authority under that statute. As in *Hermelin*, its doing so is automatic reversible error.

**B. The right to due process guaranteed in Mo. Const. art. I, § 10 and U.S. Const. Amend. XIV requires a hearing on any contested motion for temporary custody, and an order granting such a motion without a hearing violates due process.**

Outside of the express terms of § 452.380.1, the guarantee of due process of law in Mo. Const. art. I, § 10 and U.S. Const. Amend. XIV prohibits a trial court from granting a contested motion for temporary custody without notice or an opportunity to be heard. *Milner*, 223 S.W.3d at 898-99. Even if § 452.380.1 did not exist, a hearing still would be required. *Id.*

While Mother did not invoke Due Process below in her motion to set aside the temporary order, because this is a writ proceeding, not an appeal, this Court still can decide that issue. *State ex rel. Carver v. Whipple*, 608 S.W.2d 410, 412 (Mo. banc 1980) (issuing permanent writ for reason advanced for first time at oral argument; “Given the discretionary nature of the prohibition remedy, this Court may accept limitations on the issues or examine new points not offered ab initio”).

Also, while Mother’s motion to set aside invoked Rule 74.06 as authority, it also was proper under Rule 74.01(b), which makes any non-final order “subject to revision at any time before the entry of” final judgment. “[I]n evaluating” a pleading, “we do not concern ourselves with the title of the pleading or with a party’s citation to a particular Rule, but we look instead to the substance of the pleading.” *State ex rel. Mo. Parks Ass’n v. Mo. Dept. of Nat. Resources*, 316 S.W.3d 375, 382 (Mo. App. 2010). In other words, “Missouri courts have looked not to the nomenclature employed by the parties, but to the actual relief requested in the motion.” *Berger v. Cameron Mut. Ins. Co.*, 173 S.W.3d 639, 641 (Mo. banc 2005).

The trial court's power under Rule 74.01(b) to revise a nonfinal order includes power to set aside or vacate that order. *Ward v. Hentges*, 844 S.W.2d 471, 473 (Mo. App. 1992). “[T]he power given to the trial court by Rule 74.01(b) to revise an order grants jurisdiction to the trial court to vacate an order which is entered prior to the entry of a final judgment.” *Id.* Mother requested the trial court vacate its temporary custody order because a hearing was required, which was proper under Rule 74.01(b).

“[I]t is fundamental that restrictions imposed upon parental rights must be in accordance with due process of law.” *Milner*, 223 S.W.3d at 898 (quoting *Burton v. Burton*, 874 S.W.2d 461, 464 (Mo. App. 1994)). “Due process first requires that one be given sufficient notice that his or her rights are to be challenged in the courts.” *Burton*, 874 S.W.2d at 464. It then requires “opportunity to be heard, which is also a fundamental due process right” and “necessarily includes the right to present evidence and to confront and cross-examine opposing witnesses and to rebut their testimony with controverting evidence.” *Id.*

This means a decision “transferring custody from mother where she had not first received notice and an opportunity to be heard” is “void ....” *Milner*, 223 S.W.3d at 898 (quoting *Hendrix*, 183 S.W.3d at 589). “Citation of authority upon a question so plain will add nothing. The rights of a party cannot be disturbed without notice and a legal hearing.” *Id.* (quoting *Hendrix*, 183 S.W.3d at 589 (citation omitted)).

In *Milner*, the Court of Appeals held a contested temporary custody order entered without notice or an opportunity for the contesting party to be

heard was equally void for violation of due process and issued a permanent writ vacating it. *Id.* at 898-99. The mother had been awarded sole custody of the parties' children in a prior dissolution. *Id.* at 897. The father moved to modify this, alleging the mother had moved out of the state with the children without following the legal requirements for relocation, and sought the children's sole legal and physical custody. *Id.* At the same time, the father moved for temporary sole legal and sole physical custody of the children. *Id.*

The trial court had not given the mother notice it was going to enter this order, nor did it give her the opportunity for a hearing. *Id.* The mother then moved to set the order aside, explaining that this violated both § 452.380.1 and her right to due process, but the trial court refused and kept the order in place. *Id.* at 897-98.

The Court of Appeals issued a writ vacating the trial court's temporary custody order. *Id.* at 898-99. It noted that "while the trial court's order [wa]s temporary and not a final judgment or decree, it nevertheless ha[d] the effect of depriving" the mother of custody of the children. *Id.* at 898. This "impairment of [her] parental rights can be valid only if made in accordance with due process of law." *Id.* at 898-99. But "the trial court's 'Order for Temporary Custody' was entered without sufficient notice or opportunity for hearing and, thus, was entered in violation of [the mother]'s right to due process of law." *Id.* at 899. The Court of Appeals therefore ordered the trial court "to vacate the 'Order for Temporary Custody'" and directed that any further proceedings in the trial court be "as are necessary and appropriate with due regard for the parties' due process rights." *Id.*

The same as in *Milner* is true here. The trial court granted Father's contested motion for temporary custody of Son without giving Mother notice that it was going to do so or "opportunity to be heard," including "the right to present evidence and to confront and cross-examine opposing witnesses and to rebut their testimony with controverting evidence." *Burton*, 874 S.W.2d at 464. Because of this, the order "was entered without sufficient notice or opportunity for hearing and, thus, was entered in violation of [Mother]'s right to due process of law." *Milner*, 223 S.W.3d at 899.

As a matter of constitutional law, the trial court only had authority to grant Father's contested motion if it gave Mother notice and an opportunity to be heard. It did not. The trial court's decision otherwise exceeds its authority and was error.

**C. Neither the "emergency jurisdiction" provision of § 452.755.1, R.S.Mo., nor any Jackson County local rule supersedes the foregoing.**

Below, Father briefly invoked § 452.755.1, R.S.Mo., as alternate grounds for his motion for temporary custody (Ex. 38), at one point calling his motion a "temporary emergency custody" motion (Ex. 39).

This is without merit. Section 452.755 does not apply to these Missouri dissolution of marriage proceedings, and does not supersede Mother's right to a hearing under § 452.380.1 and due process.

Section 452.755.1, which is part of the Uniform Child Custody Jurisdiction and Enforcement Act, provides that "[a] court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned, or it is necessary in an emergency to protect the

child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.”

But the very next section states that this statute only is effective “if no child custody proceeding has been commenced in a court of a state having jurisdiction ....” *Id.* at .2. The case below is an ordinary Missouri dissolution of marriage, and the trial court has jurisdiction over the parties and Son. This means § 452.755.1 has no application here for “emergency jurisdiction” over Son in Missouri. *Blanchette v. Blanchette*, 476 S.W.3d 273, 277 (Mo. banc 2015). Section 452.755.1 only gives Missouri courts jurisdiction over children subject to out-of-state custody jurisdiction in case of emergency. *Id.*

Moreover, § 452.755.1 only provides a mechanism for jurisdiction, not a procedure. The procedure to seek temporary custody still would be the one in § 452.380.1, and still would require a hearing both under that statute and as a matter of due process.

Father also briefly argued that a Jackson County Local Rule authorizing a court to decide motions without a hearing gave the trial court had authority to grant his contested motion for temporary custody without a hearing (Ex. 77-78).

This is also without merit. The requirements of § 452.380.1 are statutory, and due process is a foundational constitutional requirement. The Constitution of Missouri is the “the supreme law of Missouri.” *State ex rel. Riverside Joint Venture v. Mo. Gaming Comm’n*, 969 S.W.2d 218, 221 (Mo. banc 1998). And the Constitution of the United States is “the supreme law of the land ....” U.S. Const. Art. VI cl. 2. A local court rule only applies as long

as it is “not inconsistent with the rules of this Court, the Constitution or statutory law in force.” *State ex rel. State v. Riley*, 992 S.W.2d 195, 196 (Mo. banc 1999) (quoting Mo. Const. art. I, § 15 and Rule 50.01).

As § 452.380.1, as well as the state and federal constitutions, require a hearing here, to the extent any local rule would provide otherwise it would be inconsistent with the Constitution and statutory law and would not apply.

The trial court’s order granting Father’s contested motion for temporary custody and awarding him sole legal and sole physical custody of Son during the case without any notice or opportunity for Mother to be heard exceeded the court’s authority and was error.

## **II. Prohibition lies to remedy the foregoing.**

The writ of prohibition is a fundamental part of our common law that allows this Court to prevent the usurpation of judicial power and prevent an irreparable harm to a party. § 530.010, R.S.Mo; *State ex rel. Dir. of Revenue v. Gaertner*, 32 S.W.3d 564, 566 (Mo. banc 2000). It

is appropriate in one of three circumstances: (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy an excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court’s order.

*State ex rel. Proctor v. Bryson*, 100 S.W.3d 775, 776 (Mo. banc 2003).

In this case, the writ lies because the trial court has exceeded its authority by granting Father’s contested motion for temporary custody without notice to Mother or an opportunity to be heard. As the Court of Appeals did with the temporary custody order entered without notice or

opportunity to be heard in *Milner*, which is directly on point, Missouri courts widely have used writs of prohibition to enjoin orders entered in contested matters when the trial court failed to allow a hearing, because the trial court lacks power to proceed in that manner. *See, e.g., State ex rel. Yarber v. McHenry*, 915 S.W.2d 325 (Mo. banc 1995) (issuing writ of prohibition to enjoin suspension of student from school without hearing); *State ex rel. Kairuz v. Romines*, 806 S.W.2d 451, 455-59 (Mo. App. 1991) (issuing writ of prohibition to enjoin grant of Rule 74.06 relief without a hearing).

At the same time, Mother has no adequate remedy by appeal. It is well-established that an order of temporary custody under § 452.380.1 or other statutes allowing for it is not final or appealable. *See, e.g., Collins v. Collins*, 923 S.W.2d 487, 489 (Mo. App. 1996) (order granting grandparents temporary custody of children was not appealable; appeal dismissed); *Muegler v. Muegler*, 784 S.W.2d 839, 840-41 (Mo. App. 1990) (same re order denying father's motion for temporary custody); *Femmer v. Femmer*, 669 S.W.2d 63, 63 (Mo. App. 1984) (same re order granting temporary custody pending remainder of action); *Raines v. Raines*, 590 S.W.2d 117, 118 (Mo. App. 1979) (S.D. en banc) (same).

So, Mother only would be able to appeal after a final judgment. At this point, trial is set for late April 2020 (Ex. 80). That means that absent a writ, the temporary order that violates § 452.380.1 and Mother's due process rights would be in effect for at least five months during which Father would have sole legal and sole physical custody of Son without recourse by Mother.

This would be an irreparable harm from which Mother could not recover. And she certainly never could recover any damages, which as a matter of law also always makes for an irreparable harm. *City of Kan. City v. N.Y.-Kan. Building Assocs., L.P.*, 96 S.W.3d 846, 855 (Mo. App. 2002).

For this reason, Mother also requests the Court under Rule 84.24(e) to dispense with the time limits of Rule 84.24(c)-(d) and immediately issue a preliminary writ or “stop order” to stay the trial court’s October 29 temporary custody order and its order of November 12 keeping the October 29 order in place. Immediate relief from these orders, at least during these proceedings in prohibition, is necessary and proper to avoid this irreparable harm.

The writ of prohibition lies, and the Court should issue it.

### **Conclusion**

The Court should issue a writ of prohibiting Respondent Judge Midkiff from enforcing her order of October 29, 2019 giving the respondent below temporary sole legal and sole physical custody of the parties’ child during the proceedings or her order of November 12, 2019 denying the relator’s motion to set the October 29 order aside, and from doing anything other than vacating both of those orders.

The Court also should dispense with Rule 84.24(c)-(d)’s time limits and issue a preliminary writ or “stop order” immediately.

Respectfully Submitted,

*Jonathan Sternberg, Attorney, P.C.*

by /s/Jonathan Sternberg  
Jonathan Sternberg, Mo. #59533  
2323 Grand Boulevard, Suite 1100  
Kansas City, Missouri 64108  
Telephone: (816) 292-7000  
Facsimile: (816) 292-7050  
jonathan@sternberg-law.com  
  
COUNSEL FOR RELATOR  
KELSEY KOEHLER

**Certificate of Service**

I certify that I signed the original of the foregoing, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on January 7, 2020, I filed a true and accurate Adobe PDF copy of this petition, its accompanying writ summary, the index of exhibits, and all exhibits via the Court's electronic filing system, and that I e-mailed a true and accurate copy of the same to the following:

Hon. Sandra C. Midkiff,  
Circuit Judge, Division 1  
Circuit Court of Jackson County  
415 East 12th Street, 4th Floor  
Kansas City, Missouri 64106  
Telephone: (816) 881-3601  
Facsimile: (816) 881-3732  
Div1.cir16@courts.mo.gov  
cc: Emily.ross@courts.mo.gov

Respondent

/s/Jonathan Sternberg  
Attorney

Ms. Nancy Garris  
1080 NW S. Outer Rd., Ste. 202  
Blue Springs, Missouri 64015  
Telephone: (816) 694-7746  
nancygarris@sbcglobal.net  
  
Counsel for Respondent Below  
Ryan Koehler