

**BEFORE THE SUPREME COURT of the STATE OF NEW MEXICO**

Sandra-Kay: Burris-Rice:  
Petitioner

Supreme Court No. 25, 383

vs.

The Honorable Anne M. Kass  
Respondent

VERIFIED IN FORMA PAUPERIS  
PETITION FOR SUPERINTENDING CONTROL  
BY EMERGENCY WRIT OF PROHIBITION,  
OR, ALTERNATIVELY,  
A WRIT OF MANDAMUS OR QUO WARRANTO  
AND REQUEST FOR STAY

NOW COMES Petitioner, forced to act *pro se*, pursuant to New Mexico Constitution, Article VI, Section 3 and NMRA 12-504, Rules of Appellate Procedure, and NMRCPC 1-60(b)(4), to pray this Court exercise its power of superintending control and issue a writ of prohibition, or alternatively a writ of mandamus or quo warranto prohibiting any member of the Second Judicial District Court from proceeding further against Petitioner's fundamental rights on any matter in Case No. DR-93-02899 and to transfer the case to an alternative Judicial District for a new trial *ab initio*.

For her verified petition, Sandra-Kay: Burris-Rice states that the Second Judicial District Court has and is proceeding arbitrarily, capriciously and maliciously to act against her fundamental rights without possession of subject matter jurisdiction; denying due process of law and equal protection of the law; acted against the interest and health of the parties' minor child; and that the New Mexico Court of Appeals does not offer a proper remedy or timely relief, thereby making it necessary and proper for Petitioner to seek an extraordinary writ.

Petitioner asserts that all judgements entered in the underlying litigation are void for want of procedural due process pursuant to NMRCPC 1-060(B)(4), voidable for want of due process, or have been obtained by fraud, misrepresentation and other misconduct, spelling relief under NMRCPC 1-060(B)(3).

I. JURISDICTION

A. The jurisdiction of this Court is invoked pursuant to Article V, I, Section 3 of the New Mexico Constitution and NMRA 12-504, Rules of Appellate Procedure. Petitioner prays this Court exercise its power of superintending control to assure that the traditional respect and high regard in which courts are held will not be diminished, and issue an Emergency Writ of Prohibition to prevent an inferior court from acting without jurisdiction, in excess of its jurisdiction or beyond the scope of authority; from acting further with bias and prejudice; save Petitioner from further abuse of administrative and discretionary power; that the Petitioner has and will suffer irreparable mischief, exceptional hardship, undue burdens of expense; has been denied due process and equal protection under the law; and prevent further denial of justice, fundamental rights and liberties as guaranteed by the State of New Mexico and the Constitution of this United States. The process of appeal is grossly inadequate. See **State ex rel. Rivera v. Conway**, 106 N.M. 260, aff'd on rehearing, 106 N.M. 259, (1987); **Rutledge v. Fort**, 104 N. M. 7 (1986), overruled on other grounds: **Reese v. State**, 106 N. M. 498 (1987); **Matter of Martinez**, 99 N. M. 198 (1982); **State ex rel. Bird v. Apodaca**, 91 N.M. 279 (1977); **State ex rel. Du Bois v. Ryan**, 85 N.M. 575 (1973); **State Racing Comm'n v. McManus**, 82. N.M. 108(1970); **Williams v. Sanders**, 80 N.M. 619 (1969); **State ex rel. Anaya v. Scarborough**, 75 N. M. 702 (1966); **State ex rel. v. State Corp. Comm'n v. Zinn**, 72 N.M. 29 (1963); and **State ex rel. Transcontinental Bus Service Inc. v. Carmody**, 53 N. M. (1949).

B. In the alternative, the purpose of a quo warranto is to ascertain whether a public officer

is constitutionally and legally authorized any act in or exercise any functions using public funds and public office in support of malicious abuse of process. See **Anaya v. McBride**, 88 N.M. 244 (1975); **Devaney v. Thriftway Marketing Corporation**, 1998-NMSC-001, Vol. 37, No. 5, SBB 19. Petitioner asserts a controlling necessity for this court's jurisdiction in that no judge assigned to the underlying case has authority to review the decisions created by another judge presiding in said case; and no judge, assigned or otherwise, may exercise unconstitutional authority in support of deliberate offenses against citizens of New Mexico using public funds and public office as the means. See Section 25, Article IV, and Section 13, Article VI, Constitution of New Mexico.

C. In the alternative, this Court exercises constitutionally invested original jurisdiction in Mandamus against all state officers, [**State ex rel. Sego v. Kirkpatrick**, 86 N. M. 359(1974)]; to compel performance of statutory duty, [**Witt v. Hartman**, 82 N.M. 170 (1970)]; to restore rights and privileges of which Petitioner is illegally deprived, [**Bird v. Apodaca**, 91 N.M. 379 (1977)]; to direct the court to act, even though by appeal or writ of error existed, but where such remedy was grossly inadequate, [**State ex rel. Meyers Co. v. Reynolds**, 22 N. M. 473 (1917)]; and attack constitutionally defective and statutorily defective procedures, practices, pleadings or statutes in direct and deliberate support against citizens of New Mexico, [**Thompson v. Legislative Audit Commission**, 79 N. M. 693 (1968)].

D. The Stay requested is considered to be of great public interest where fundamental rights to access to the process and family associations are summarily assaulted and undermined without procedural or substantive due process or equal protection to ensure fair and honest proceedings before the court.

#### REAL PARTIES IN INTEREST

The real party in interest is Robert K. Rice, whose last known address is 6225 Montgomery NE, Apt. 115E, Albuquerque, N.M. 87106. His Attorney is James Curry, whose address is 2817

San Mateo Blvd. NE, Albuquerque, N.M. 87110.

GROUNDS FOR THIS APPLICATION

This case entails a series of usurpations of law and due process evolving around the Second Judicial District Court Family Division creation of an administrative system within itself to interpret, re-write, and apply statutory law by the Trial Court's sole discretion in direct contradiction of the powers reserved exclusively to the executive branch by public policy and legislative intent. For example, only the Protective Services Division of Children, Youth, & Family Department has the authority to remove or order the removal of a child without a hearing. However, even the Children, Youth, & Family Department must provide reasonable evidence that a child is being abused and is in danger at a hearing within ten (10) days of the removal or return the child. NMSA (1982) 10-301, 10-302, 10-303, 11-509, and NMSA (1978) (1997) revised 32-1-3, 32-1-22A(4). The power of the Family Court, acting in its own unaccountable administrative capacity, has no such constraints. Retrospective review cannot preserve fundamental fairness when a class of proceedings is governed by constitutionally defective evidentiary standards and procedures. U.S.C.A. Const. Amend. V, XIV; **Santosky v. Kramer**, 455 U.S. 745 (1982). The extent to which procedural due process must be afforded to a party is influenced by the extent to which he may be condemned to suffer injury and loss. **Little v. Streater**, 452 U.S. 1 (1980).

The attached order of the trial court dated February 16, 1994 surrendering Plaintiff's absolute right to appeal was entered by the trial court without knowledge of Plaintiff. As is the customary operating procedure of the trial court Plaintiff was given no notice or opportunity to be heard. (See Exhibits 1 and 2). Plaintiff had no knowledge of this order until March 18, 1998. As evidenced by the attached docket sheets as Exhibits 3 and 4, there was no reference to such order until August 1997. The absence of reference to same order may also indicate record tampering.

The order dated February 16, 1994, eliminates Plaintiff's absolute right to "appeal on technical grounds such as failure to comply with rules of procedure and rules of evidence". This order stands to clarify why the trial court Judge Anne M. Kass refuses to hear evidence.

The power of the states to regulate concerning marriage and family is constitutionally limited and rights involved are fundamental. **Loving v. Virginia**, 388 U.S. 1 (1967). The state legislature, in enacting statute affecting status of protected right, must provide for due process within the statute and may not leave it to the discretion of the courts. **Coe v. Armour Fertilizer Works**, 237 U.S. 413 (1914).

The trial court denied Appellant's Article VI., Section II., Bill of Rights, absolute right to appeal, and First Amendment Right Guaranteeing access to the courts on entry of the February 16, 1994 order. **Bell v. Burson** 402 U.S. 535, L.Ed.2d 90 and **Bill Johnson's Restaurants, Inc., v. National Labor Relations Board**, (U.S. 1983) 461 U.S. 731, 113 L.R.R.M. (BNA) 2647, 76 L.Ed.2d 277, 97 Lab.Cas. P 10, 130. The order is absolutely void on its face for want of notice and an opportunity to be heard. "A judgement is void only if the court rendering it 'lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process of law.'" (Citations omitted). **Classen v. Classen**, 119 N. M. 582, 585 (App. 1995), 893 P.2d 478. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." **Armstrong v. Manzo**, 14 L ed 2d 62, at 65, 380 U.S. 545, 85 S Ct 1187 (1965). "A fundament requirement of due process is 'the opportunity to be heard.' (Citation omitted.) It is an opportunity which must be granted at a meaningful time and in a meaningful manner." **Id.**, at 66.

Pursuant to NMRCP 1-060(B)(4), Petitioner may raise subject matter jurisdiction at any time, **Chavez v. County of Valencia**, 86 N.M. 205, at 209, 521 P.2d 1154 (1974); there is no time

limitation where the judgement is void, **Eaton v. Cooke**, 74 N.M. 301, 393 P.2d 329 (1964); and the Court is without discretion to set aside the void judgement, **Chavez**, *supra*.

In essence, in this and other similarly situated cases, the protected rights of Petitioner and her child have been taken into custody by the State without providing a legal process by which they might cure the intentional injuries inflicted upon them by the uncontrolled administrative complex that is the Domestic Relations division of the Second Judicial District Court. “‘Administrative law,’ as the term is generally used today and for the purposes of this article, is concerned with the legal problems arising out of the existence of agencies which to a noteworthy degree combine in a single entity legislative, executive, and judicial powers which, in the American system of law, were traditionally kept separate.” **1 Am Jur 2d § 1**.

If it is legislative practice to have due process default to full trial if not otherwise specified in statutory wording, then the judiciary does not follow legislative intent in due process-to apply standards of proof- and fails its duty to the public interest that a thorough hearing show existence of statutory grounds before judgement is entered. If the legislature intended that there be no trial, then it is duty of the judiciary to strike down the statute as an arbitrary deprivation of constitutional rights. Instead, the judiciary has embarked on its own social agenda of divorce, custody and division of property on demand inconsistent with other legislation and thoroughly repugnant to both the state and federal constitutions. It goes far beyond the bounds of public consent as to how we shall be governed, attacking the structure of government and principles guarding the fabric of society, even to undermining the principles of our concepts of civilization. See **Maynard v. Hill**, 125 U.S. 190 (1888).

By the terms of the order entered February 16, 1974, the court adopted an administrative capacity which usurped the protected right of Petitioner to procedural due process and judicial review that is not contemplated by statute. That petitioner was not granted even the rudimentary

opportunity to knowingly and voluntarily consent to an administrative rather than judicial process is repugnant to the state and federal constitutions. “The 1976 district court found as a matter of law that the failure to give the notice required by statute rendered all subsequent acts void...By failing to follow statutory procedures, due process of law was violated and no subsequent act could correct the defect.” **Nesbit v. City of Albuquerque**, 91 N. M. 455, 459 (1977), 575 P. 2d 1340. It is basic to our understanding of government that constitutional constraints are placed on the government in order to protect the sovereignty of the people from deprivations by any branch. “ By a limited Constitution, I understand one which contains certain specific exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto laws*, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.” *The Federalist Papers, No. 78*, Alexander Hamilton.

“Administrative law is concerned with and results from a fusion of different types of governmental power in certain public officers which are a part of the executive branch of the government or act as agents of the legislative branch, yet who exercise powers similar to those exercised by courts, including a coercive power over individuals, since the exercise of this type of power by this type of officer runs afoul of fundamental and traditional tenets of American governmental faith.” **1 Am Jur 2d § 3.**

“... While such agencies are not courts, their creation involves the emergence of a new system of courts in the broad sense no less significant than the evolution of chancery... Administrative law is not a usurper of the courts or common law. Both systems may exist side by side, as the systems of equity and common law have anciently done. Indeed, the common law and our constitutions mold the development of administrative law, and the common law may eventually

absorb what is found to be the procedural advantages of the administrative process as it has absorbed the substantive principles of equity.” **1 Am Jur 2d § 15**. In the instant case, as in others similarly situated, the systems have symbiotically fused for the convenience of the Bench and the Bar to the detriment of individual rights protected by the state and federal constitutions. Petitioner is unaware of any inherent powers granted by any authority to this new and unexpected process of government. “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.... In order to form correct ideas on this important subject it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.” *The Federalist Papers, No. 47*, James Madison.

Again on April 25, 1996 without any notice or opportunity to be heard Plaintiff suffered loss of due process when Judge Kass ruled contrary to statutory law and violated Plaintiff's absolute right to due process when fundamental rights are in question. The order entered that relieved Petitioner's custody was *ex parte* by nature and process. See Exhibit 5 and 6. “The prohibition against *ex parte* communications with the court applies to any issue in any location, whether in court, in a social context, or otherwise. It makes no difference whether the communication relates only to a procedural or administrative matter. Such matters are often of strategic importance to the parties. The fundamental precept of the adversary system is that both sides have notice and the judge give both sides an opportunity to present a position and oppose the other party's position. It is from the interplay of the presentations by all parties that a fair judgement can be made.” **Magness v. Magness**, 79 Md.App. 668, 558 A.2d 807, 811 (Md.App. 1989).

The U. S. Supreme Court has declared:

This Court's decisions have by now made plain beyond the need for multiple

citation that a parent's desire for and right to the 'companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a power for countervailing interest, protection.' A parent's interest in the accuracy and ... justice of the decision to terminate his or her parental status is, therefore, a commanding one.

**Lassiter v. Dept. of Social Services**, 452 U.S. 18, 27 (1981) citing **Stanley v. Illinois**, 405 U.S. 645, 657 (1972). New Mexico courts have followed the premise that deprivation of parental rights is a matter of great significance to all of the involved parties. Evidence must be "clear and convincing" which is stronger than mere preponderance and yet something less than beyond reasonable doubt. **State ex rel Dept of Human Services v. Natural Mother**, 96 N.M. 677, 634 P.2d 699 (1981); **Huey v. Lente**, 85 N.M. 585, 514 P.2d 1081 (1983); **In the Matter of Adoption of John Doe**, 98 N.M. 340, 648 P.2d 798 (1981). "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdained present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It, therefore, cannot stand." **Stanley, supra**.

The order of July 16, 1997, again entered without hearing of evidence or notice that access to the court be restricted was appropriately before the court as a matter of consideration. See Exhibit 7. By holding Petitioner's access to the process hostage to the payment of a GAL's fees is not only unconstitutional under Amendment One of the United States Constitution, but also extortionate in consequence. **M.L. B., Petitioner, v. S. L J., Individually and as Next Friend of the Minor Children, S. L. J. And M.L. J., et ux**, 117 S. Ct. 555 (1996); See also **Boddie et al v. State of Connecticut**, 91 S.Ct. 780, 401 U.S. 371, (U.S. Conn. 1971), access to process may not be made contingent upon a party's ability to pay.

"The right of access to the courts is one aspect of the right to petition the government for redress of grievances, as guaranteed by the First Amendment to the U. S. Constitution, and also is

protected by the provision protecting due process of law, as set out in the Fourteenth Amendment to the U. S. Constitution and in Article II, Section 18 of the New Mexico Constitution...A person's right of access to the courts may be satisfied by an evidentiary hearing which comports with the minimum requirements of due process.” **Board of Education of Carlsbad Municipal Schools v. Harrel**, 118 N. M. 470, 480 (1994), 882 P.2d 511.

“This Court has recently noted that “meaningful access to the courts is a right of fundamental importance in our system of justice. ‘The right of access to the courts is one of aspect of the right to petition the government for redress of grievances, as guaranteed by the First Amendment to the U.S. Constitution, and also is protected by the provisions protecting due process of law, as set out in the Fourteenth Amendment to the U.S. Constitution and in Article II, Section 18, of the New Mexico Constitution . . . the right of access to the courts is also protected by the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment. (Citations omitted.)” **Devaney v. Thriftway**, 1998-NMSC-001, Vol. 37, No. 5, SBB 19, at 22.

Guardians ad Litem are commonly appointed to serve a dual role both as legal representatives of the children while their parents litigate custody and at the same time serve as quasi-judicial advisors to the court for the same case. **Tumey v. State of Ohio**, 47 S. Ct. 437, 441, 273 U.S. 510, 521 (1927). While these Guardians ad Litem benefit financially from ongoing controversy, they are readily allowed to create such controversy without being bound by the state and federal Constitutions, NMSA Rules of Evidence or the Rules of Civil Procedure, Domestic Relations Law, or the Children's Code. The first consideration of the Trial Court must be the best interests of the child. 40-4-9.1(A) NMSA (1994). **Collins on behalf of Collins v. Tabet**, 111 N.M. 391, 398, 806 P.2d 40, 47 (N.M. 1991). Statutory law mandates that before a change of custody can be made, there must be specific findings showing significant changed circumstances affecting the best interests of the child and that the proposed change of custody is in fact in the best interests

of the child. **Fuentes v Shevin**, 1983 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed.2d 556. 10 UCC Rep.Serv. 913.

WHEREFORE, Petitioner prays this court will issue an Emergency Writ of Prohibition denying the Second Judicial District Court further authority to proceed in this matter and transfer the case to an alternate Judicial District or other court of competent jurisdiction for a new trial *ab initio*;

Or, in the alternative, issue a Writ of Mandamus to the Second Judicial District Court cease and desist in its malicious abuse of process and restore to Petitioner her fundamental rights, her parental rights, her custody rights, her property, and compensation for injury and losses suffered sufficient to deter the same from recurring to another;

Or, in the alternative, issue a Writ of Quo Warranto ascertaining whether the Second Judicial District Court is constitutionally and legally authorized to use public funds and public office to further acts deviating from Constitutional law and principles, statutory authority and procedural safeguards for parties appearing before it;

And, a Stay Order to prevent further harm, injury, intimidation and retaliation against Petitioner by any member of the Second Judicial District Court;

And, whatever further relief this Court deems necessary and proper to further the interests of justice and reparation to Petitioner, her child and her family, and the wider class of parents and children who have been subjected to similar or like unconstitutional practices and procedure.

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Sandra-Kay: Burris-Rice:  
211 Highway 165  
Placitas, New Mexico state 87043  
(505) 867-5510

SUBSCRIBED TO AND SWORN before me this \_\_\_\_\_ of September, 1998.

\_\_\_\_\_  
Notary Public

My Commission expires

\_\_\_\_\_

I hereby certify that a true  
copy of the foregoing shall be Hand  
Delivered to all parties of interest,  
as listed on the attached, listing  
of Persons Served, on the 21<sup>st</sup>  
day of the Ninth month, in this  
year of our Lord, Nineteen-hundred  
and ninety-eight.

\_\_\_\_\_  
Sandra-Kay: Burris-Rice