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### Brownell v. District Court of County of Larimer

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FILED IN THE  
SUPREME COURT  
OF THE STATE OF COLORADO

JUN 27 1983

David W. Brezina, Clerk

IN THE SUPREME COURT  
OF THE STATE OF COLORADO  
Case No. 83 SA 190

JAMES E. BROWNELL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	ANSWER TO RULE
	)	TO SHOW CAUSE
DISTRICT COURT IN AND FOR THE	)	
COUNTY OF LARIMER, et al.,	)	
	)	
Respondents.	)	

Submitted on behalf of the  
Respondents by:

COLORADO RURAL LEGAL SERVICES, INC.

By: Janet L. Rodriguez  
JANET L. RODRIQUEZ #11028  
315 West Oak, Suite 710  
Fort Collins, Colorado 80521  
Telephone: 493-2891

IN THE SUPREME COURT  
OF THE STATE OF COLORADO  
Case No. 83 SA 190

JAMES E. BROWNELL, )  
 )  
 ) Petitioner, )  
 )  
 vs. ) ANSWER TO RULE  
 ) TO SHOW CAUSE  
 )  
 DISTRICT COURT IN AND FOR THE )  
 COUNTY OF LARIMER, et al., )  
 )  
 Respondents. )

COME NOW, COLORADO RURAL LEGAL SERVICES, INC., by JANET L. RODRIQUEZ, attorneys for Petitioner, SYNDEE BROWNELL, and submit the following Answer to the Rule To Show Cause issued out of this Court on May 19, 1983, on behalf of the District Court in and for the County of Larimer and the Honorable JOHN-DAVID SULLIVAN, a Judge of the same Court, Respondents herein.

I. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

Petitioner sought and obtained the Rule to Show Cause issued by this Court because the Respondent Court denied the Petitioners Motion to Change Venue in the case of: In Re the Marriage of: SYNDEE BROWNELL and JAMES E. BROWNELL, Case No. 83-DR-194. For purposes of convenience, the Petitioner herein will be referred to as "Husband", the Petitioner in the action below will be referred to as "Wife", and the Respondent in this matter as the "District Court".

On or about December 31, 1982, the Husband threatened to shoot the Wife and in fact fired a weapon at the Wife and at other persons. When the Husband was arrested, he had the minor children of the parties with him in the vehicle, and the weapon as in the laps of said minor children. The children were returned to the Wife, and the Wife then fled Garfield County in fear of her life and safety, and that of her minor children, for the protection of the battered women's shelter in Fort Collins, Larimer County, Colorado. Shortly thereafter, the Wife commenced the action for dissolution of marriage in the District Court for Larimer County, and the Husband was served with process at his home in Garfield County, Colorado. The Husband filed a Motion for Change of Venue from Larimer County to Garfield County and a supporting brief and affidavit, all of which are attached to the Petitioner's Complaint as Exhibits "A", "C" and "D". The Wife filed a Countermotion, attached hereto as Exhibit "1", praying that the District Court deny the Motion for Change of Venue and retain venue in the District Court in and for Larimer County.

The Motions came on for hearing on April 4, 1983, and the District Court denied the Husband's Motion for Change of Venue. A transcript of that hearing has been attached to the Petitioner's Complaint.

## II. ARGUMENT

Owen v. Owen, 127 Colo. 359, 257 P.2d 581 says at Page 584, "...an action for divorce unquestionably is an action in

rem. Hanscom v. Hanscom, 6 Colo. App. 97, 39 P. 885." This is because the subject matter of the action is the status of the parties. Delanoy v. Delanoy, 216 Cal. 27, 13 P.2d 719. A proceeding in rem includes both the status of individuals as well as their relations to others. 1 Am Jur 2d, Actions §40.

It is therefore, equally clear that a child custody proceeding is likewise an action in rem. This in fact is the position adopted by the Restatement, Conflict of Laws, §§117, 118, 144-148. Presumably this is why §14-10-123, C.R.S. 1973, and the Uniform Child Custody Jurisdiction Act provide that venue in a child custody proceeding is in the county where the child is permanently resident or found.

It would appear, then, that where the subject matter of the case is the status of the parties and their relation to the minor children of the parties, and the status of the minor children themselves, the action is purely an in rem proceeding. The main purpose of the action at bar is to determine the status of the Wife and the minor children of the parties; therefore, it is an action in rem. There is no real estate involved, and the personal property is of little value; the only truly controverted issue is child custody. Since both dissolution of marriage proceedings and child custody proceedings are actions in rem, Colorado Rule of Civil Procedure 98(a) is determinative of the venue issue. This rule states that venue in an in rem proceeding is in the county in which the subject of the action, or a substantial part of the action, is situated. Therefore, venue is

proper in Larimer County because the Wife and the children are permanently resident in Larimer County and are found in Larimer County.

The fact that human beings are involved in a highly emotionally charged situation does not cause the proceeding to be one in personam; the subject matter of the action is still the status of the parties, and the action is in rem.

Jameson v. District Court, \_\_\_\_ Colo. \_\_\_\_, 72 P.2d 449 (1946) held that the substance of an action determines proper venue, not the form of the action. And that Rule 98(a) is not restricted to actions affecting realty.

Even if venue would be proper where either the Petitioner or the Respondent resides because the res is wherever one of the parties to the marriage is located, or would be proper where the children reside because child custody is a substantial part of the subject of the action, "...the change of venue cannot be properly granted from either unless some other provision requiring the change arises." City of Cripple Creek v. Johns, \_\_\_\_ Colo. \_\_\_\_, 494 P.2d 823 (1972). The Husband has not met his burden of showing that some other provision requires a change of venue. The Wife, however, argued that the witnesses to the children's present environment, including doctors, teachers, social workers and close family, are all located in Larimer County. It is also a matter of record that the Wife is an indigent and cannot afford to retain counsel in Garfield County, and the Court is asked to take notice that there is no Legal Services

Corporation office in Garfield County, although there is the Northwest Pro Bono Project. And it would, therefore, be very difficult if not impossible for the Wife to find counsel in Garfield County to represent her if the action were transferred from Larimer County to Garfield County. Clearly such a transfer of venue would not promote the ends of justice.

The more recent cases discussing venue indicate that there is no obligation to strictly adhere to People ex rel. Lackey v. District Court, 30 Colo. 23, 69 P. 597 (1902), People ex rel. Martin v. Dolores County Court, 72 Colo. 374, 211 P.2d 102 (1922), People ex rel. Martine v. Adams County Court, 101 Colo. 67, 70 P.2d 345 (1937), Stanko v. Routt County Court, 110 Colo. 428, 135 P.2d 232 (1943). Bacher v. District Court, 186 Colo. 314, 527 P.2d 56 (1974), does say that the Rules of Civil Procedure apply to a divorce proceeding, but it also says that the convenience of the witnesses and the promotion of the ends of justice are proper considerations and bases for changing venue. Furthermore, a Motion for Change of Venue is left to the sound discretion of the Trial Court, and the Trial Court's ruling would not be disturbed upon review absent a clear showing of abuse.

Walsmith v. Lilly, 194 Colo. 273, 571, P.2d 1107 (1981) also says at Page 1108 that, "Venue in dissolution of marriage cases is governed by C.R.C.P. 98." But the case goes on to say that if the parties can justify venue where neither of the party resides, then venue would be where neither party resides. This implies, if anything, that venue is proper where the convenience of the parties and witnesses, and the ends of justice will be

promoted. The Court says at Page 1109, "There are undoubtedly a variety of fact situations where the justice of the cause would demonstrate that a dissolution case should be tried outside the residence of either or both of the parties."

The fact situation of the case at bar is one of those where the justice of the cause shows that the case should be tried outside the residence of the Husband. The Wife gathered her children and fled the family home in an effort to protect the health and safety of herself and her children, and in doing so has suffered severe financial losses. She is now dependent upon Aid to Families with Dependent Children to supplement her meager income. She could not possibly afford to retain counsel to represent her in Garfield County should the action be transferred there. The Husband, however, has retained counsel in both Larimer and Garfield Counties.

In addition, the subject matter of the within action, the marital status of the Husband and the Wife and the status of the minor children of the parties, is located where the Wife and the minor children are located, which is in Larimer County.

Cases cited by Petitioner in his Complaint upon careful scrutiny, fail to discuss the substance of a dissolution action, and fail to address the in rem nature of dissolution proceedings. People ex rel. Lackey v. District Court, supra, attempted to address the following issue: "Does the provision of the Code providing that civil action in certain circumstances shall be tried in the county of the residence of the Defendant apply in divorce proceedings?" The Court ignored the nature of a divorce



action as being an action in rem, and based their decision upon Civil Code §27 which provided that all civil actions except those depending upon the situs of the subject matter of the controversy, or where the cause or some part thereof arose, shall be tried in the county in which the Defendant may reside at the commencement of the action. If the Court had addressed the issue of the nature of a divorce action as being an action in rem, it would seem that the Court would find that venue depends upon the situs of the subject matter of the controversy in accordance with Civil Code §27. And venue would have been proper wherever either of the parties resided, in accordance with the divorce act then in effect, and would have decided venue on the bases of where the subject matter of the bulk of the controverted issues were located.

People ex rel. Martin v. Dolores County Court, supra, merely cited Lackey, supra for the proposition that that section of the Code which requires that a case be tried in the county of Defendant's residence, unless the Defendant was served in the county of Plaintiff's residence, is applicable in a divorce proceeding. The case fails to discuss the in rem nature of a divorce proceeding, even though the Defendant in that case was served by publication. What is particularly odd about this case is that even if the correct civil procedure in a divorce case is for venue to lie in the county of Defendant's residence, unless Defendant was served in the county of Plaintiff's residence, the Defendant was served in the County of Plaintiff's residence, ser-

vice having been by publication, but venue was nevertheless ordered changed.

### III. CONCLUSION

The Rule to Show Cause issued by this Court should be dissolved for a number of reasons. First, a dissolution of marriage action and a custody proceeding are actions in rem. And pursuant to Colorado Rule of Civil Procedure 98(a), venue is proper in the county where the subject matter of the action is located. Because the Wife and the minor children are permanent residents of and are found in Larimer County, venue is proper in Larimer County.

The failure of prior decisions of this Court to address the in rem nature of dissolution proceedings while interpreting prior divorce acts and rules of procedure does not oblige this Court to treat venue questions under the Uniform Dissolution of Marriage Act in the same manner.

If the Court decides to not decide venue issues under Rule 98(a), Colorado Rules of Civil Procedure, then the Court should follow Bacher v. District Court, supra, and Walsmith v. Lilly, supra, and uphold the Respondent's decision that equitable circumstances do not require a change to Garfield County since

there has been no clear showing of abuse of discretion by the Respondent.

RESPECTFULLY SUBMITTED,

COLORADO RURAL LEGAL SERVICES, INC.

By: Janet L. Rodriguez  
JANET L. RODRIQUEZ  
Attorney Registration No. 11028  
Attorney for Petitioner  
Syndee Brownell  
315 West Oak, Suite 710  
Fort Collins, Colorado 80521  
Telephone: 493-2891

CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer To Rule To Show Cause was delivered to the office of MR. JOSEPH T. CARROLL, JR., Attorney for Petitioner, at 110 East Oak Street, Fort Collins, Colorado 80524, by hand delivering same to his office on this 24th day of June, 1983.

Janet L. Rodriguez

DISTRICT COURT, COUNTY OF LARIMER, COLORADO

Case No. 83-DR-194

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COUNTERMOTION TO RETAIN VENUE

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In Re the Marriage of:

SYNDEE BROWNELL,

Petitioner,

and

JAMES E. BROWNELL,

Respondent.

---

COMES NOW the Petitioner, by and through her undersigned attorney and moves this Court for an Order denying the Respondent's Motion for Change of Venue and retaining venue of the above-captioned action in Larimer County. As grounds therefor, Petitioner states as follows:

1. Petitioner has filed a Petition seeking custody of the minor children, JAMES RICHARD BROWNELL and AMIS C. BROWNELL, as well as seeking a dissolution of her marriage to the Respondent, James E. Brownell. Venue is proper in a child custody action, "...in the County where the child is permanently resident or where he is found." Section 14-10-123, C.R.S., 1973. Said minor children are permanent residents of Larimer County, and have been found in Larimer County since they fled in fear of their health and safety from Glenwood Springs, Colorado, on or about January 1, 1983. Since that time, said minor children have seen physicians in Larimer County, the older child, James, attends kindergarten in Larimer County, they have had contact with the Larimer County Department of Social Service's case workers; thus they have been developing significant contacts with the County of Larimer. Furthermore, their maternal grandparents are residents of Larimer County.

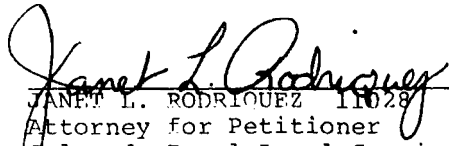
2. Petitioner is a poor person, depending on AFDC for her income, and has no vehicle or other means of transportation that would enable her to travel to Garfield County in order to prosecute the within action. The Respondent, on the other hand, retains possession of the parties' 1979 Toyota Landcruiser, and is gainfully employed as a plumber in Glenwood Springs. It would, therefore, be manifestly inconvenient and inequitable to the Petitioner for venue to be changed to Garfield County.

Exhibit 1, page 1

3. In addition, the ends of justice would be thwarted were the Court to order a change of venue because the Petitioner would be without legal counsel. Petitioner's Legal Services counsel would be forced to withdraw if the case were removed to Garfield County because the Rules of Colorado Rural Legal Services, Inc., prohibit staff attorneys from representing persons whose cases are pending in jurisdiction other than the county served by such attorney's office. Furthermore, there is no Legal Services Corporation office which services Garfield County to whom counsel for the Petitioner could transfer the case, or ask to accept the case. Hence, it would promote the ends of justice for the Court to enter an order denying Respondent's Motion for Change of Venue since both Petitioner and Respondent would be represented by legal counsel.

WHEREFORE, Petitioner prays for an Order denying Respondent's Motion for Change of Venue and retaining venue in the District Court in and for the County of Larimer, and for such further relief as the Court deems proper.

RESPECTFULLY SUBMITTED:

  
JANET L. RODRIGUEZ 11028  
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Colorado Rural Legal Services  
315 West Oak, Suite 710  
Fort Collins, Colorado 80521  
Telephone: 493-2891

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Countermotion to Retain Venue was mailed, postage prepaid, to IRA M. KARET, Attorney for Respondent, to his offices at 927 Cooper Avenue, Glenwood Springs, Colorado 81601, this 7<sup>th</sup> day of March, 1983.

