

IN THE COURT OF COMMON PLEAS
CHAMPAIGN COUNTY, OHIO



TERESA A. GALLUZZO (nka COOK), *
Plaintiff, *

CASE NO. 93-DR-247

v.

MOTION TO DISMISS

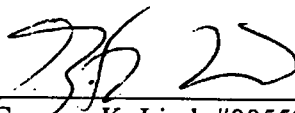
MICHAEL A. GALLUZZO, *
Defendant. *

COMPLAINT FOR CONTEMPT

AND TO VACATE PRIOR COURT

ORDERS

Now comes the Defendant, by and through counsel and moves this Court to dismiss the Complaint for Contempt for failure to pay child support filed on behalf of the Plaintiff. Counsel also moves this Court for an Order to vacate prior Court Orders issued by this Court in this case pursuant to Civil Rule 60. Counsel has attached the following memorandum in support of the motion to dismiss.



Gregory K. Lind, #0055227
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FILED

MAR 27 8 01 AM '01

DIANNE CODER, CLERK
COMMON PLEAS COURT
CHAMPAIGN COUNTY, OHIO

CERTIFIED
TO BE A TRUE COPY OF THE
ORIGINAL Motion FILED Mar 27, 2001
CERTIFIED THIS 10th DAY OF Sept 2001
DIANNE CODER, Clerk
COMMON PLEAS COURT
CHAMPAIGN COUNTY, OHIO
BY Sarah Woods DEPUTY

MEMORANDUM

The issue before the Court is a complaint by the Plaintiff against the Defendant for non-payment of support, and a complaint by the Defendant against the Plaintiff for non-payment of Court Ordered debt.

On December 8, 1993, the Plaintiff filed for divorce. On December 16, 1993, the Champaign County Common Pleas Court issued temporary orders naming the Plaintiff temporary residential parent and further provided for a temporary child support order. No evidence was elicited from the parties at this hearing. Throughout the hearing, the Defendant also requested custody of the minor children.

It is well settled that parents have protected liberty interest in the custody of their children. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212. The parent-child relationship "is an important interest that warrants deference and, absent a powerful countervailing interest, protection". *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981). Parents have a liberty interest in the custody of their children, and, therefore, any deprivation of that interest by the state must be accomplished by procedures meeting requirements of Due Process. The state must hold a hearing to determine if a parent is unfit prior to separating that parent from a child. "The state registers no gain when it separates children from the custody of fit parents" and in fact spites it's own articulated goals in doing so. *Stanley v. Illinois, supra @ 651-653*. Divorcing parents in Ohio also have a statutory right to equal treatment concerning the custody of their children as per ORC 3109.03.

The temporary orders hearing involved the adjudication of child custody and the garnishment of the Defendant's income for child support purposes, thus, effecting a substantive

right. When a substantive right is implicated, Due Process requires the following:

- (a) The applicable law is justified by a compelling State interest;
- (b) The effected party is provided a notice and a hearing in a meaningful way and at a meaningful time;
- (c) That said matter is tried by an impartial officer of the Court;
- (d) That an opportunity exists to present, confront, and examine witnesses and evidence;
- (e) The right to be represented by counsel;
- (f) That any resulting decision to override or abridge the affected parties fundamental right must be supported by clear and convincing evidence with a particularized showing of advantage for said decision, and
- (g) That the state must use the least restrictive means possible to secure said compelling interest. Failure to comply with the requirements noted above is a violation of Due Process when dealing with a substantive right.

The Defendant was designated by the Court, as the non-residential parent resulting in a termination of residential parenting rights. This decision further eliminated the Defendant's capability to make legal decisions concerning the children, restricted access to the children, a reduction in contact time with the children, and an assumption of a support obligation grossly in excess had his custodial rights not been terminated.

The temporary orders hearing held December 16, 1993 provided no notice for termination of custody, no evidentiary hearing, no opportunity to examine evidence, no evidentiary standard in support of said decision, no compelling state interest for violating a substantive right, and was

not the least intrusive means to secure any possible interest the state may have had.

Subsequent to the temporary orders hearing, the Champaign County Common Pleas Court has continuously denied the Defendant custody of his children. In all decisions from this Court, the Defendant has never been found unfit to raise his children. To satisfy Due Process, a notice to terminated parental rights must include the alleged factual basis for termination and a statement of the legal standard authorizing termination.

Due to the lack of Due Process, the temporary orders issued in 1993 are void, each decision rendered by the Magistrates are also void, the decree of divorce is also void and all further post decree judgements are null and void.

The randomness, excessive discretion, and vagueness applied in this case is demonstrated in this case by the fact that every decision of the court could have been made in the opposite and still not have been reversible or an abuse of discretion.

Due to the excessive discretion and ambiguity in law, lack of standards and no weight of evidence standard the Defendant can never vindicate his rights and he will always face this problem under Ohio law. A claim that Ohio's procedures do not allow a vindication of Defendant's rights states a cognizable due process violation. *Agg v. Flanagan (1988), 855 F.2d 366.*

If a judgement is void, it is a nullity from the outset and any motion for relief from a void judgement is timely regardless of when it is filed. If voidness of judgement is found then relief from judgement is not discretionary and any order based upon that judgement is also void.

When voidness is found the remedy is for the court to start over from the point at which the violation took place. *Armstrong v. Manzo, 380 U.S. 545-552 (1965).* The prior judgements

in this case were rendered without due process and the matter must be retried. An actual deprivation occurs when an unconstitutional judgment is enforced. *Wood v. Orange Cty.*, 715 F.2d 1543, 1559 (1983).

Enforcement of any existing orders in this case should be immediately stayed pending final resolution of this motion and any subsequent constitutional challenges that arise. It would not be proper for the Court to take additional enforcement action based upon void judgements. Said enforcement would only further violate Defendant's rights.

If the Court attempts to proceed with enforcement at this point then Defendant will need to seek a TRO and injunction from the federal courts.

The Court should stay the execution of all judgements pending resolution of the matters subject to this motion.

The Court should vacate the judgements in this case as noted or at a minimum grant Defendant an evidentiary hearing to secure said relief. The Plaintiff should be required to compensate Defendant for all costs associated with the divorce.

NOTICE OF RESERVATION OF FEDERAL RIGHTS:

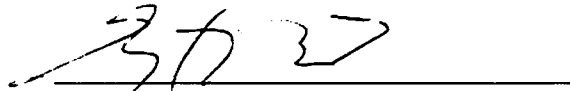
Defendants notify the Court of their constitutional objections but reserve federal jurisdiction over said rights and reserve their right to litigate said issues in federal court.



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CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to attorney Ronald Tompkins, at 107 West Court Street, Urbana, Ohio 43078, by regular U.S. Mail on this 27th day of March, 2001.

A handwritten signature in black ink, appearing to read 'G. Lind', is written over a horizontal line.

Gregory K. Lind
Attorney for Michael A. Galluzzo