

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

FILED
KIMMEL, JUDGE
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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

MICHAEL A. GALLUZZO,

Plaintiff,

-vs-

CHAMPAIGN COUNTY COURT
OF COMMON PLEAS, et al.,

Defendant.

Case No. C-3-01-174

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

**DECISION VACATING ORDER JOINING THE STATE OF OHIO AS A PARTY
DEFENDANT AND RE-JOINING THERESA COOK AS A PARTY DEFENDANT;
STATE OF OHIO'S MOTION TO DISMISS FOUND MOOT**

This case is before the Court on the Motion to Dismiss of the State of Ohio and its Attorney General, Betty Montgomery (Doc. No. 59). In this case Plaintiff Michael Galluzzo challenges the constitutionality of Ohio Revised Code § 3109.04 and Ohio R. Civ. P. 75(N) insofar as they allows a parent to be deprived of custody of his children without proof by clear and convincing evidence that he is unfit to be a parent (Amended Complaint, Doc. No. 20, ¶4).

On October 2, 2002, District Judge Rose adopted the Magistrate Judge's recommendation that the Champaign County Common Pleas Court be dismissed as a party because it was not a proper party to defend the constitutionality of this statute and rule. Accompanying the Substituted Report and Recommendations (Doc. No. 48) which contained this recommendation was an Order to Plaintiff to join a sufficiently adverse party. Plaintiff responded by moving to add both the State of Ohio and his ex-spouse, Theresa Cook (Doc. No. 49). Offered the choice, the Court chose to add the State of Ohio rather than Ms. Cook because of the State's available legal resources and to avoid imposing a burden on Ms. Cook (See Order Joining the State of Ohio as a Party Defendant, Doc.

No. 53). The Court had previously certified the case to the Attorney General as one involving the constitutionality of a state statute (Doc. No. 47).

By its instant Motion, the State, through the Attorney General, has made it abundantly clear that it does not desire to defend the constitutionality of this statute and rule, at least in this case. Neither the State nor the Attorney General is a necessary party to this case. All that is necessary is that there be a party sufficiently adverse to Plaintiff to allow this Court to exercise its undoubted jurisdiction to decide the constitutionality of the statute and rule. Although the Court has not yet decided the question, it appears Plaintiff has sustained a sufficient injury in fact to have standing to raise the claim.

Given the State's posture, the Court RECONSIDERS *sua sponte* its decision on Plaintiff's Motion to Join (Doc. No. 49). The Order Joining the State of Ohio as a Defendant (Doc. No. 53) is hereby VACATED. That branch of Plaintiff's Motion seeking to re-join his ex-spouse, Theresa Cook, as a defendant is hereby GRANTED.¹

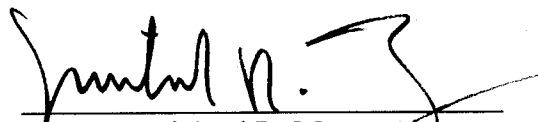
Theresa Cook was already served with process in this case (Doc. No. 10) and entered an appearance through Attorney Sanford Flack. It is accordingly ORDERED:

1. The Clerk shall reactivate Ms. Cook as a party defendant and Mr. Flack as her counsel.
2. Plaintiff shall forthwith contact Mr. Flack and determine from him what additional documents filed in this case since Ms. Cook was dismissed he has not received and wishes to review and then shall furnish him with copies of those documents.
3. This case is set for a pretrial conference December 16, 2002, at 9:00 a.m. by telephone. At that time the Court intends to set a schedule to obtain briefing on the constitutional questions which will enable a prompt decision.

¹As the Court previously noted, Ms. Cook was served with the Motion seeking to join her as a defendant and did not oppose it.

The Court having vacated its Order joining the State of Ohio as a Defendant, the State and Attorney General's Motion to Dismiss is MOOT.

November 21, 2002.



Michael R. Merz
United States Magistrate Judge