

FRANKLIN COUNTY COURT OF COMMON PLEAS
CIVIL DIVISION
COLUMBUS, OHIO

Charles R. Evans, *et al.*,
PLAINTIFFS,
vs.
The State of Ohio, *et al.*
DEFENDANTS.

CASE NO. 08 CVH-11-157
Judge J. Lynch

FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO
2008 DEC 19 PM 3:36
CLERK OF COURTS

MEMORANDUM CONTRA TO STATE OF OHIO'S MOTION TO DISMISS

Plaintiff Charles Evans files his Memorandum Contra to the State of Ohio's Motion to Dismiss. Where the State of Ohio's Motion to Dismiss is without merit, it must be DENIED as a matter of law which is detailed in the following Memorandum of Law.

First, the State of Ohio requested dismissal pursuant to Civil Rule 12(B) (1). This Court has jurisdiction to address Plaintiff's constitutional challenge to Ohio's statutes and procedural rules. Herein, the actionable claim is for declaratory judgment as to the express constitutionality of Ohio's statutory scheme that implicates fundamental parental rights.

The actionable claim, *i.e.*, a pending divorce in the domestic relations court, is for issuance of a divorce decree.

Therefore, the actionable claims are separate and distinct issues.

This Court may declare rights, status, and other legal relations whether or not further relief is or could be claimed. R.C. 2721.02(A).

The jurisdictional priority rule does not obtain here.

Second, the State of Ohio requested dismissal pursuant to Civil Rule 12(B) (6).

Where parental and associative rights are substantive rights, Plaintiff's First Amended Complaint requests declaratory judgment of the constitutionality of R.C. 3109.04, R.C. 3109.043, and CivR. 75(N) [hereinafter Ohio's "statutory scheme"]. The Amended Complaint asserts Ohio's statutory scheme is expressly unconstitutional on its face. Where constitutionally-protected parental rights are implicated under state law the Amended Complaint asserts Ohio's statutory scheme is unconstitutional as written under federal law and violates the supremacy clause [Article IV]. The Amended Complaint asserts that Plaintiff was denied an evidentiary hearing where Plaintiff's parental rights

were implicated. The Amended Complaint asserts Plaintiff was denied his parental rights and right to custody of Plaintiff Collin Evans, which reciprocal associative rights were further restricted without an express constitutionally compliant evidentiary standard. The Amended Complaint asserts the state's evidentiary standard must be strictly construed under federal law. The Amended Complaint asserts Plaintiff was denied an evidentiary hearing to modify the deprivation of his parental rights by a state court order [filed March 2008] upon Plaintiff's motion to modify the deprivation of his parental rights filed in the court record. The Amended Complaint asserts Plaintiff's deprivation of his fundamental parental rights are capable of repetition and evade review.

The Amended Complaint asserts that the state court has never held an evidentiary hearing in the 2 years since the divorce case was filed by Defendant Carol M. Davis in January 2007, however, Plaintiff was deprived of his parental and associative rights by the state court without any finding of fact and where there are no express due process requirements in the statutory scheme. The Amended Complaint asserts that the state court ordered Plaintiff the further arbitrary restriction of *supervised* visitation without a finding of fact by any evidentiary standard further impinging upon his state-mandated visitation rights. The Amended Complaint asserts Plaintiff has no remedy under Ohio's statutory scheme. The Amended Complaint asserts that a constitutionally compliant remedy is expressly required under federal law. Declaratory judgment of Ohio's statutory scheme, plead in great detail in the Amended Complaint will settle the controversy completely within the scope of the Declaratory Judgment Act. R.C. 2721.03.

The Ohio Supreme Court held that a declaratory judgment action is proper if: (1) the action is within the scope of the Declaratory Judgment Act; (2) a justiciable controversy exists between adverse parties; and (3) speedy relief is necessary to preserve rights that may otherwise be impaired. *Freedom Found v. Ohio Dept. of Liquor Control* (1997), 80 Ohio St. 3d 202, 204.

The State of Ohio's Motion to Dismiss pursuant to Civil Rule 12(B) (1) and 12(B) (6) is *without* merit. Plaintiff's Memorandum of Law in Support is attached hereto.

Respectfully submitted,


Charles R. Evans

MEMORANDUM OF LAW

DECLARATORY JUDGMENT ACT: JURISDICTION

A declaratory judgment action is a creature of statute. R.C. 2721.01. The procedure for obtaining a declaratory judgment must be in accordance with the civil rules. Civ.R. 57. A declaratory judgment may be commenced as set forth in R.C. 2721.03. The state common pleas court has subject matter jurisdiction to declare the rights, status, and other legal relations, *e.g.* constitutionality of Ohio law [R.C. § 2721.03; Am Complaint ¶s 5-7] whether or not further relief is or could be claimed. [R.C. § 2721.02; Am Complaint ¶s 1, 2].

The plain language of the statute is inapposite of the state's claim that this court lacks subject matter jurisdiction. Their allegation that the general division court and the domestic relations court would have concurrent jurisdiction is without merit. The state's argument that the tribunal whose power is first invoked...acquires jurisdiction, to the exclusion of all tribunals, to adjudicate upon the whole issue and to settle the rights of the parties would be applicable where the actionable claims are the same. However, "[I]t is a condition of the operation of the state jurisdictional priority rule that the claims or causes of action be the same in both cases". *State ex rel. Sellers v. Gerken* (1995), 72 Ohio St.3d 115, 117 quoting *State ex rel. Judson v. Spahr* (1987), 333 Ohio St. 3d 111, 113.

Different Causes of Action

The actionable claim for declaratory judgment of the constitutionality of Ohio's statutory scheme in this Court is not the same cause of action for achieving a divorce decree in the domestic relations court are separate and distinct. [*Sellers, id.*] Where "it is a condition of the operation of the state jurisdictional priority rule that the claims or causes of action be the same in both cases and if the second case is not for the same cause of action, nor between the same parties, the former suit will not prevent the latter." [*Sellers, id.*] The jurisdictional priority rule does not obtain here.

Different Claims for Relief

The state domestic relations court is a court of limited jurisdiction.

The domestic relations division of the court is empowered by statute specified in Title 31 of the Ohio Revised Code. This division is permitted to adjudicate matters pertaining to divorce, dissolution, legal separation, annulment, civil domestic violence

cases, and retains jurisdiction to enforce its own orders. Chapters of the Ohio Revised code that address various types of legal proceedings involving the family include R.C. 1901; 1907; 2101; 2105; 2111; 2151; 2931; 2945; 3105; 3107; 3109; 3113; 3115; & 5103.

Source: Ohio Family Court Feasibility Study; Linda Szymanski, Statute Analysis: Ohio Family Court Jurisdiction, National Center for Juvenile Justice, Pittsburgh, PA 1996.

The domestic relations court does not have jurisdiction to declare the constitutionality of Ohio's statutory scheme pursuant to the Declaratory Judgment Act.

Further, the causes of action and the corresponding claims for relief in the two matters are separate and distinct. As a matter of law, invoking the Declaratory Judgment Act excludes the state domestic court's ability to adjudicate the relief sought by Plaintiff as to the constitutionality of Ohio's statutory scheme.

Different Parties

The parties must be the same in both cases. [*Sellers, id.*] In the divorce the parties are Plaintiff Evans and Defendant Davis [captioned *Plaintiff Davis vs. Defendant Evans* in pending divorce]. In the instant declaratory action, the parties are Plaintiff Evans, Defendant State of Ohio, and as required pursuant to the Declaratory Judgment Act [R.C. 2721.12(A)] "...all persons who have or claim any interest that would be affected by the declaration **shall** be made parties to the action or proceeding." The statute mandates that Defendant Davis is a necessary party. However, the parties are not the same in both cases. The State of Ohio is not a party to the divorce action. [*Sellers, id.*]

ACTIONABLE CLAIMS FOR RELIEF

The Ohio Supreme Court has held that a declaratory judgment action is proper if:

- (1) the action is within the scope of the Declaratory Judgment Act;
- (2) a justiciable controversy exists between adverse parties;
- (3) speedy relief is necessary to preserve rights that may otherwise be impaired.

Freedom Found v. Ohio Dept. of Liquor Control (1997), 80 Ohio St.3d 131, 134.

There is no equally serviceable remedy available for this case. The statutory jurisdictional limitation of the state domestic relations court precludes rendering judgment of the constitutionality of Ohio's statutory scheme pursuant to the Declaratory Judgment Act, which (1) the action is within the scope of the Declaratory Judgment Act.

Thus, a declaratory judgment complaint “cannot be dismissed even if the Court determines the plaintiff is wrong, rather, in such a case, the court must declare the appropriate rights.” *Id.*

There is (2) a justiciable controversy between the parties, which are adverse in the underlying divorce and where the different parties are adverse in the instant matter. The controversy is whether Ohio’s statutory scheme is constitutionally compliant. Defendant Davis’ answer filed in this matter addresses the fact that she *believes* it to be constitutional. Defendant State of Ohio argues the same and goes on to try to divert this Court’s attention from the fact that a substantive deprivation occurred without any remedy and that the remedy is to go back to the same Court that denied Plaintiff in the first place (which deprivation of rights gave rise to the instant action).

“Declaratory judgment proceedings should not be used to anticipate the trial of an issue in a court of coordinate jurisdiction and do not authorize a court to make prophecies about what another court would do for plaintiff.”

26 Corpus Juris Secundum (2001), Declaratory Judgments, Section 44.

Plaintiffs **know** the full force and effect of the past 2 years. The statutory scheme provides no constitutionally compliant remedy at law.

The instant matter is a justiciable controversy between adverse parties.

**Speedy Relief is Necessary to Preserve Fundamental Rights Impaired
under Ohio’s Statutory Scheme**

Plaintiff Evans cannot appeal an interlocutory order. Since the divorce was filed in January 2007, there has not been one evidentiary hearing. Plaintiff’s parental rights were not only implicated and denied; in addition, Plaintiff’s visitation was further restricted by an interlocutory order requiring supervision which essentially eliminated Plaintiff from his son’s Plaintiff Collin Evans [DOB 10/26/1998] life. The interlocutory order was challenged under a motion to modify where due process was denied Plaintiff Evans. The due process deprivation is so egregious that a divorce attorney agreed to handle the case for no compensation the past 9 months. Where he was to be paid from the proceeds of the marital assets, Defendant Davis has failed to comply with the order to provide the funds until the matter is settled.

In a March 2008 entry addressing the deprivation of his parental rights and denial of an evidentiary hearing, Plaintiff was denied an evidentiary hearing upon his filed motion request to modify the temporary orders. Where temporary orders are interlocutory in nature, interlocutory orders are not appealable.

Appealable orders are required to be final judgment entries. Plaintiff has no remedy and cannot recover time lost, important time when a child is growing up.

Declaration will Terminate the Controversy Giving Rise to the Action in Which the Declaratory Relief is Sought [R.C. 2721.07]

Declaration of the constitutionality of Ohio's statutory scheme will resolve the controversy entirely where the express language of the statutory scheme fails to mandate an evidentiary hearing prior to the deprivation of fundamental parental rights. Where Ohio's statutory scheme fails to expressly include an evidentiary standard that is constitutionally compliant under federal law, there is no ability for any party to achieve a constitutional outcome under any set of circumstances.

The State of Ohio asserts that this Court may dismiss a declaratory judgment action pursuant to CivR 12(B)(6) where in accordance with R.C. 2721.07, the uncertainty or controversy giving rise to the proceeding would not be terminated. The fallacy of this argument in this set of circumstances is the fact that no remedy exists in the statutory scheme. The case cited is not on point with the fact set in the instant matter.

Plaintiff challenged the interlocutory order. Plaintiff was expressly denied an evidentiary hearing, however, his most precious parental rights have been denied without any evidence, without a finding of fact, and without an evidentiary standard.

“Declaratory judgment proceedings usually pertain to substantive rights...”
Risman v. Van Sweringen Co. (1962), 21 Ohio Op.2d 173.

The fact remains that Ohio's statutory scheme lacks essential requirements for conducting an oral hearing where the language explicitly states; “upon satisfactory proof by affidavit duly filed with the clerk of the court, the court, without oral hearing ... may make a temporary order regarding the allocation of parental rights and responsibilities for the care of the child while the action is pending.” [R.C. 3109.043 & CivR. 75(N)]

Plaintiff suggests that this trier of fact will recognize the explicit lack of basic due process principles inapposite of the process due litigants subject to the court system. “Proof by

affidavit” denies an evidentiary standard and “without oral hearing” denies any remedy, not to mention cross-examination of any evidence.

Further, 2 years is not “temporary”. The Court’s filed entry [March 2008] denying Plaintiff’s filed motion requesting an evidentiary hearing [November 2007] flies in the face of jurisprudence.

Federal law requires express due process requirements in the language of the statute. Ohio’s statutory scheme not only patently ignores these requirements, but also expressly denies all due process in the language of R.C. 3109.043 and CivR 75(N). To deny a parent the ability to raise their child for 2 years without any right to an evidentiary hearing goes against the principles of law and simple fairness. Further, Ohio’s statutory scheme denies the right to cross-examination, the right to confront witnesses, and fails to use the least restrictive means to maintain the associative rights of each parent and child, et al.

The facial language of Ohio’s statutory scheme lacks express due process requirements as mandated by federal law, Sixth Circuit Federal Court of Appeals, and U.S. Supreme Court decisions. The fact that Plaintiff can be denied his parental rights for 2 years without any evidentiary hearing is outrageous. And this scene plays out daily in domestic courts throughout Ohio for no parent can achieve a constitutional remedy under any set of circumstances where all Ohio parents’ parental rights are implicated under Ohio’s statutory scheme. Where Ohio’s statutory scheme lacks the basic requirements of due process required to protect substantive rights, there is no ability to achieve a constitutional result. In comparison, Ohio’s *criminal* codes offer far more protection for the implicated, where the statutes expressly state the process due the offender facing criminal charges. The process is specific and orderly.

Plaintiff’s, and all Ohio parents and children’s, remedy for speedy relief is declaratory judgment of the statutory scheme that gives rise to the substantive deprivation of constitutional liberty and associative rights. The Declaratory Judgment Act provides the speedy relief necessary to “terminate the uncertainty or controversy giving rise to the action”. [R.C. 2721.07] *Freedom, id.*

On November 3, 2008, Plaintiff filed a Motion to Advance the Hearing of this Action on the Trial List pursuant to CivR. 57 where time is of the essence and prompt judicial action is essential. [Am Complaint ¶s 3,4]

Jury Trial Endorsed Hereon

Plaintiff Evans expressly endorsed a jury trial as a matter of right on the front of the Complaint and First Amended Complaint. As part of Plaintiff's request for speedy relief, Plaintiff reiterates his request for a jury trial pursuant to Civil Rule 38(B). The intent of the endorsement on the complaints was to notify the Court and Defendants of Plaintiff's intention to have the matters tried to a jury. [R.C. 2721.10]

United States Court of Appeals for the Sixth Circuit Decision
Michael A. Galluzzo v. Champaign County Court of Common Pleas, et al.
(January 31, 2006) No. 04-3527 File Name: 06a0078n.06
(Per curiam, unpublished)

"This case raises some very interesting constitutional questions about the fundamental rights of parents in child custody proceedings. The questions are so interesting in fact, that they have generated reams of arguments on the merits from a dedicated and able *pro se* plaintiff...The discussion of the constitutional issues is impressive..." ...[T]he case was simplified into a general constitutional challenge."
[*Galluzzo, id.* @ pg.4-5]

"These [state] courts will surely provide Galluzzo with an adequate forum to argue the constitutional issues presented by this case...Because there is no "case" or "controversy" here sufficient to warrant federal court jurisdiction, we AFFIRM the district court's dismissal of this case, albeit on alternate grounds."
[*Galluzzo id.* @ pg. 8.]

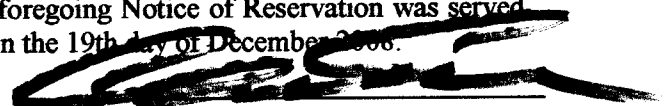
The federal declaratory judgment matter addressed in *Galluzzo*, the constitutional challenge to Ohio's custody statutory scheme, is now in the proper state forum to argue the constitutional questions about the fundamental rights of parents in child custody proceedings.

WHEREFORE, for good cause shown, *and as a matter of law*, Plaintiff respectfully requests DISMISSAL of the Defendant State of Ohio's Motion to Dismiss.


Charles R. Evans

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Notice of Reservation was served upon all parties or their counsel at Columbus, Ohio, on the 19th day of December, 2006.


Charles R. Evans