IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Charles R. Evans, et al.,	:	
	:	
Plaintiffs,	:	**Case No. 08 CVH-11-15756**
	:	
v.	:	**Judge J. Lynch**
	:	
The State of Ohio, et al.,	:	
	:	
Defendants.	:	

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

This action should be dismissed because the same controversy is pending in a previously-filed action before the Franklin County Domestic Relations Court. In his memorandum opposing the motion to dismiss, plaintiff Charles Evans argues that the rule of jurisdictional priority should not apply because:

(1) The claims and/or causes of action in the two cases are different;

(2) The domestic relations court lacks jurisdiction to rule on the constitutionality of a statute; or,

(3) The parties in the two cases are different.

All three contentions are wrong as a matter of law. (For ease of analysis, however, this memorandum will address Mr. Evans' points in a different order than he raised them).

I. The Jurisdictional Priority Rule Applies When the Two Actions Involve the Same "Whole Case," Irrespective of Whether the Parties are Exactly Identical.

As between two courts of concurrent jurisdiction "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." *State ex rel. Racing Guild of Ohio v. Morgan* (1985), 17 Ohio St. 3d 54, 56. This rule has led numerous courts to find a lack of jurisdiction where a case has been filed first in domestic relations court. See *In re Guardianship of Campbell*, 2006 Ohio 1764, 2006 Ohio App. LEXIS 1614 (domestic court

had jurisdictional priority over probate court); *Reams v. Reams* (6th Dist.), 2005 Ohio 5264, 2005 Ohio App. LEXIS 4792 (domestic court had jurisdictional priority over common pleas court); *DuFresne v. DuFresne* (6th Dist.), 2000 Ohio App. LEXIS 4850 (same for municipal court). There is no doubt that the Franklin County Domestic Relations Court was the first court to acquire jurisdiction over the dispute between Mr. Evans and Carol Davis concerning custody of their child.

Mr. Evans argues the "first-filed" rule does not apply because his "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 [but instead] are separate and distinct." [Memorandum, p.3]. He is mistaken.

In support of his motion, he cites *State ex rel. Sellers v. Gerken* (1995), 72 Ohio St. 3d 115. In *Sellers*, the Supreme Court noted that the jurisdictional priority rule does not apply unless the claims or causes of action are the same in both cases. *Id.* at 117, quoting *State ex rel. Judson v. Spahr* (1987), 33 Ohio St. 3d 111, 113. *Sellers* involved a legal malpractice claim by Sellers against his former attorneys, and a defamation claim by the lawyers against Sellers, two plainly separate and distinguishable causes of action.

In relying upon *Sellers*, Mr. Evans fails to note that the Supreme Court has carved out an exception to the *Sellers* rule: the concurrent jurisdiction priority rule applies in cases where the two lawsuits are not identical but are "sufficiently similar." *State ex rel. Charron-Krofta v. Corrigan* (8th Dist.), 1995 Ohio App. LEXIS 4520, citing, inter alia, *State ex rel. Racing Guild of Ohio v. Morgan* (1985), 17 Ohio St. 3d 54; *State ex rel. Phillips v. Polcar* (1977), 50 Ohio St. 2d 279.[1] Under this exception, where a suit is commenced in one jurisdiction which

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[1] Mr. Evans' reliance on *Sellers* is misplaced for a second reason. Seller was seeking a writ of prohibition against one of the judges. The Supreme Court expressly noted that, although it was denying the writ, it was not ruling on the jurisdictional issue, "since our review is limited to whether * * * jurisdiction is patently

involves the "whole issue" between the parties, a second court may not interfere with the resolution of the issue filed in the first court. *Michaels Bldg. Co. v. Cardinal Fed. S. & L. Bank* (1988), 54 Ohio App. 3d 180, 182. To determine if two lawsuits involve the "whole issue," the court must ask two questions:

(1) Are cases pending in two different courts of concurrent jurisdiction that involve substantially the same parties? And;

(2) Might a ruling by the second court affect or interfere with the resolution of the issues before the court where suit was originally commenced? *Id.*

A. The Two Cases Involve "Substantially" the Same Parties.

Mr. Evans argues that the two cases do not involve identical parties because, although he and Carol Davis are adverse parties in both suits, the Attorney General is not a party to the domestic court action. There are two flaws with this contention. First, if Mr. Evans were to bring his constitutional challenge in the domestic court, the Attorney General would have a statutory right to join as a party to defend the statute (see R.C. 2721.12), and then there would be complete identity of parties. But secondly, the parties need not be completely identical, merely "substantially" alike. The addition of a single new party will not defeat the jurisdictional priority rule (for if it did, it would invite artful pleading of claims against multiple defendants in multiple courts).

There is no shortage of case law to illustrate this principle, including cases involving the jurisdiction of the domestic court:

(1) *Davis v. Cowan Sys.* (8th Dist.), 2004 Ohio 515, 2004 Ohio App. LEXIS 474: jurisdictional priority rule barred suit in Cuyahoga County even though the Cuyahoga case involved two parties who were not named in the Portage County suit;

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and unambiguously lacking." *Id.* at 118, quoting *Goldstein v. Christiansen* (1994), 70 Ohio St. 3d 232, 238; see also *State ex rel. Dannaher v. Crawford* (1997), 78 Ohio St. 3d 391, 394.

(2) *CWP Ltd. Pshp. v. Vitrano* (8th Dist.), 1997 Ohio App. LEXIS 2116: jurisdictional priority rule barred suit in Cuyahoga County even though the Cuyahoga case involved three parties, and the Summit County case involved only two; and,

(3) *Langaa v. Pauer* (11th Dist.), 2002 Ohio 5603, 2002 Ohio App. LEXIS 5611: two separate suits, one brought by an estate trustee and the other by the trustee in her individual capacity, involved substantially the same parties.

B. A Ruling from this Court Might Interfere with the Domestic Court's Jurisdiction.

Without question, a judgment from this Court could interfere with Judge Preisse's jurisdiction over the domestic court case. Indeed, that is the entire purpose of this suit: Mr. Evans wants this Court to declare R.C. 3190.04, R.C. 3109.043, and O.R.Civ.P. 75(N) unconstitutional, in order to nullify the temporary custody order issued by Judge Priesse in reliance on that statute.

This case is indistinguishable from *Dzina v. Avera Int'l Corp.* (8th Dist.), 2006 Ohio 1363, 2006 Ohio App. LEXIS 1229. As in the present case, there was a domestic suit pending at the time Mr. Dzina filed suit in common pleas court against his ex-wife and her corporate entity. Among his many claims, Mr. Dzina made an allegation of fraud in the negotiations that resulted in the separation agreement. The court of appeals understood this as a claim for fraud in the inducement; if Mr. Dzina prevailed, the result would be the undoing of the separation agreement, which would directly interfere with the domestic court's continuing jurisdiction over that very same agreement.

Mr. Dzina argued his claim could proceed in common pleas court because, depending on the outcome, it might not interfere with the domestic court's jurisdiction. (Mr. Evans might make the same argument here: if his constitutional challenge *fails*, the domestic court's temporary custody order would be unaffected by this litigation). But the court of appeals

correctly observed that the test is whether the outcome of the case "**may** affect or interfere with the resolution of the issues" before the domestic relations court. *Id.*, quoting *Davis v. Cowan Sys.* (8th Dist.), 2004 Ohio 515, 2004 Ohio App. LEXIS 474. A court has an obligation to determine its jurisdiction based on the pleadings. Accepting Mr. Dzina's argument would require a court to try the entire case, to find out the outcome, before it could make a decision concerning its jurisdiction (a result that would defeat the judicial economy principals that the jurisdictional priority rule is designed, in part, to promote).

A party cannot avoid the domestic court's jurisdiction by dressing up a claim in other language. For example, in *Fronk v. Chung* (11th Dist.), 1999 Ohio App. LEXIS 2009, the ex-wife received a cognovit note as part of the couple's separation agreement. When the ex-husband defaulted, she filed a show cause motion in the domestic court, then went to common pleas court to take judgment on the note. The appellate court held that any ruling by the common pleas court pertaining to the enforceability of the note would interfere with the domestic court's jurisdiction over the same matter.

Based on these and other cases, it is clear that the jurisdictional priority rule applies. The mere addition of the Attorney General as a party to defend the constitutionality of the Revised Code will not defeat operation of the rule.

II. A Declaratory Judgment Action is not a Different Claim or Cause of Action From a Suit for Substantive Relief.

A necessary corollary of the "whole case" doctrine is that the causes of action in the two lawsuits need not be identical for the jurisdictional priority rule to apply. *State ex rel. Phillips v. Polcar* (1977), 50 Ohio St. 2d 279 (applying the principle where one action sought specific performance and the other sought rescission). The fact that Mr. Evans' has stated a different legal theory in his case, namely, a request for declaratory judgment, is of no consequence.

Courts have routinely applied the jurisdictional priority rule to preclude declaratory judgment actions, the resolution of which might interfere with the jurisdiction of another court in pre-existing litigation, starting with the Ohio Supreme Court in *John Weenink & Sons Co. v. Court of Common Pleas* (1948), 150 Ohio St. 349 (prohibiting declaratory judgment action that would interfere with suit for damages based on the same proceeds). The Franklin County Court of Appeals applied the rule to bar a declaratory judgment action concerning ownership of a certificate of need where the parties were already litigating the issue under a breach of contract theory in another court. *Crestmont Cleveland Pshp. v. Ohio Dep't of Health* (10th Dist.), 1999 Ohio App. LEXIS 4175. And the Eleventh District Court of Appeals applied the rule to bar a declaratory judgment action regarding the question of insurance coverage in favor of a prior suit seeking damages. *Am. Family Ins. Co. v. Howe*, 2005 Ohio 4434, 2005 Ohio App. LEXIS 4023.

Mr. Evans argues at length that there is "a justiciable controversy" among the parties under the Declaratory Judgment Act. But the existence of a controversy is only the start of the analysis. This Court might have had jurisdiction to hear the matter if there were not already litigation pending. But there is, and this Court lacks jurisdiction.

III. The Domestic Relations Court has Jurisdiction to Determine Mr. Evans' Rights – Including the Constitutional Rights Asserted.

Mr. Evans argues that this case is necessary because the domestic relations court does not have jurisdiction to declare the constitutionality of Ohio's statutory scheme. [Memorandum, p. 3-4]. In support of his position Mr. Evans cites various Revised Code provisions listing the supposed "limited" jurisdiction of the domestic relations court. Mr. Evans' claim of lack of jurisdiction fails as a matter of law.

The Ohio Constitution provides that the courts of common pleas and *divisions* thereof shall have such original jurisdiction over "all justiciable matters . . . as may be provided by

law." OH. CONST. Art. IV, § 4. R.C. 2721.02 authorizes "courts of record" to issue declaratory judgments. There is no question that the domestic relations court is a "court of record." In fact, pursuant to R.C. 2301.03(A), the judges in Franklin County who preside over divorce, dissolution, and parentage matters are "designated as judges of the court of common pleas, division of domestic relations," and "exercise the same powers and jurisdiction" as the other judges of the Franklin County Court of Common Pleas. Simply put, if the general division of the Franklin County Court of Common Pleas has the power and jurisdiction to declare a statute unconstitutional, the domestic relations division does as well. Therefore, pursuant to the Ohio Constitution and Revised Code, the domestic relations court in Franklin County has the power and jurisdiction to rule on declaratory judgments challenging the constitutionality of Ohio's statutory scheme.

Other common pleas court divisions have decided constitutional questions, not just the general division. In the case of *In re Petition for Writ of Habeas Corpus of Baker* (1996), 116 Ohio App. 3d 580, the Franklin County Juvenile Court specifically ruled on the constitutionality of R.C. 2151.26. *Id.* at 581. And in *Fischer v. Wright* (5th Dist.), 2001 Ohio 1900, 2001 Ohio App. LEXIS 5573, the domestic court decided a constitutional challenge to its own governing statute. In neither case was the court's jurisdiction to decide the constitutional question challenged.

V. Conclusion.

Mr. Evans has a remedy for his complaints. He can challenge the constitutionality of the statutes in the domestic relations court, and he can take a direct appeal from any adverse decision. What he cannot do is initiate a separate action. Defendant, the State of Ohio, respectfully asks this Court to grant the motion and dismiss the case for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Reply brief in Support of Defendant's Motion to Dismiss was sent by regular U.S. Mail, postage pre-paid, to the following counsel of record, on this 29th day of December, 2008:

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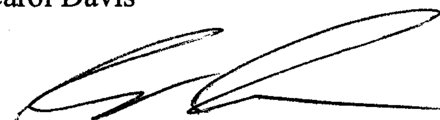

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