

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

CHARLES R. EVANS,
PLAINTIFF-APPELLANT,

-vs-

STATE OF OHIO, et al
DEFENDANT-APPELLEES.

CASE No.09APE02-0135

ACCELERATED CALENDAR

On Appeal from the Franklin County
Court of Common Pleas, Civil
Division Case No. 09 CVH11-15756
Columbus, Ohio

FILED
COURT OF APPEALS
FRANKLIN COUNTY, OHIO
2009 APR 16 PM 4:39
CLERK OF COURT

APPELLANT CHARLES R. EVANS'
MOTION FOR LEAVE TO SUPPLEMENT APPELLANT'S BRIEF
INCORPORATED HEREIN

Appellant Evans respectfully moves for leave of court to supplement Appellant's Brief, incorporated herein. Appellees have not filed a responsive brief in this matter.

The basis for this request is the Franklin County Domestic Relations Court's March 19, 2009 Judgment Entry, attached hereto as EXHIBIT 1, for a *De Novo* hearing to be held April 17, 2009.¹ This *De Novo* hearing does not and **cannot** remedy Appellant's *facial* challenge made under the declaratory judgment statute(s); R.C. § 2721.01- 2721.16. In addition, there is a parties problem.

The State of Ohio is a required party for declaratory judgment actions challenging the facial constitutionality of Ohio's laws, however; the State of Ohio is not a party to Appellant's domestic relations action, and as a sovereign entity, cannot be a party in a divorce. Where a divorce and a declaratory judgment action are distinct legal actions, a facial challenge cannot be addressed in the domestic relations court. See *Cicco v. Stockmaster*, No. 99-85 (Ohio 06-07-2000) Ohio Supreme Court.

Obviously, the March 19, 2009 Entry for a *De Novo* hearing was the direct result of the filing of the instant March 11, 2009 Appellant's Brief. However, the scheduled

¹ Where the Franklin County Domestic Relations Court stated it "just now realized" a hearing had "never been held" ...more than a year ago, its' March 8, 2008 Judgment Entry @ paragraph 3 stated:

"Mr. Evans' request for modification of temporary visitation orders is overruled because the present order is relatively recent, November, 2007, and final hearing is set for June 12th and 13th, 2008 and can be comprehensive and final from all evidence presented at that time."

hearing does not remedy Appellant Evans' ability to facially challenge R.C. § 3109.04, R.C. § 3109.043 and Civil Rule 75(N) {"statutory scheme"}.

Appellant continues to have no equally serviceable remedy to **facially** challenge R.C. § 3109.04, R.C. § 3109.043 and Civil Rule 75(N). **Only** the declaratory judgment act affords Appellant his facial challenge to the language of the statutory scheme.

"The proper vehicle for challenging the constitutionality of an ordinance on its face is a declaratory judgment action." *Martin v. Independence Board of Zoning Appeals*, Cuyohaga App.No. 81340, 2003-Ohio-2736, citing at 8; *Grossman v. Cleveland Heights* (1997), 120 Ohio App.3d 435.

The scheduled hearing, if held, would estop Appellant's opportunity to facially challenge the statutory scheme. Further, an "as applied" hearing would render the instant appeal *moot*. Appellant is not seeking an "*as applied*" remedy. A *De Novo* hearing in the Franklin County Domestic Relations Court cannot put *Humpty Dumpty* back together again where it would be applying *the same* facially unconstitutional statutory scheme.

Appellant has already been denied his parental and associational rights for more than 2 years without any *constitutional* evidentiary process. The "*as applied* remedy" is only capable of repetition, but has continued *for far too long*, to evade review. A facial constitutional challenge will break the cycle of misery for Appellant and all Ohio parents where the statutory scheme will be required to protect fundamental rights...not deny them.

Appellant will not foolishly waive his right to the only proper serviceable remedy, *i.e.*, declaratory relief, and subject himself to the "as applied" *De Novo* hearing and then be estopped from his facial challenge *and at the same time*, have the instant appeal deemed a moot issue.

The **only** remedy is declaratory relief. The present statutory scheme, R.C. § 3109.04, R.C. § 3109.043 and Civil Rule 75(N), provides *no remedy under any set of circumstances in any Ohio divorce with children* as facially written where the statutory scheme denies all Ohio parents a procedural process due upon implication of fundamental rights secured by the Ohio and U.S. Constitutions.

WHEREFORE, Ohio's declaratory judgment act, *i.e.*, R.C. §2721.01- §2721.16, is the only serviceable remedy available for Appellant's facial challenge to R.C. § 3109.04, R.C. § 3109.043 and Civil Rule 75(N).

The Franklin County Domestic Relations Court cannot declare R.C. § 3109.04, R.C. § 3109.043 and Civil Rule 75(N) unconstitutional on its face in a pending divorce case. A separate action for declaratory relief, *i.e.*, the instant action, is the only proper serviceable remedy to address facial constitutional challenges. The April 17, 2009 hearing in the Franklin County Domestic Relation's Court is not an equally serviceable remedy for Appellant's facial challenge to Ohio's statutory scheme *and* request for declaratory relief.

The State of Ohio is the proper party defendant² to defend the facial constitutionality of R.C. § 3109.04, R.C. § 3109.043 and Civil Rule 75(N) under the declaratory judgment act; *however*, the State of Ohio, as a sovereign entity, cannot be party to a divorce action where Ohio's general divorce statutes are not in appropriate form as to parental and associative rights *and* property matters, *i.e.*, mandatory property division.

Charles R. Evans, APPELLANT
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Appellant's MOTION FOR LEAVE TO SUPPLEMENT APPELLANT'S BRIEF INCORPORATED HEREIN was served upon all parties or their counsel by ordinary mail, postage paid at Columbus, Ohio, on the 16th day of April 2009.

Charles R. Evans

² Plaintiff Collin Evans and Defendant-Appellee Davis are also proper parties under the declaratory judgment act whose rights would be immediately affected by declaratory relief.

Ex. 1

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS AND JUVENILE BRANCH

Carol M. Davis :

Plaintiff :

vs. :

Charles R. Evans :

Defendant :

Case No. 07DR-0355
Judge Thomas E. Loudon
(Sitting by Assignment)


JUDGMENT ENTRY

A De Novo hearing for temporary custody is assigned for April 17, 2009, at 10:00 a.m. for two (2) hours.

The Court had assumed a temporary custody hearing had been held previously and just now realized it has never been held.

An in-camera interview with the child shall be held after the hearing.

IT IS ORDERED.


THOMAS E. LOUDEN, Judge

Prepared by the Court
Copies to:

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Stephanie L. Gibson (0067987)
Guardian ad Litem

COMM. OF JUVENILE COURT
CLERK OF COURTS
APR 17 10 00 AM '09