

**IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT**

CHARLES R. EVANS,
PLAINTIFF-APPELLANT,

CASE No.09APE02-0135

-vs-

ACCELERATED CALENDAR

STATE OF OHIO, et al
DEFENDANT-APPELLEES.

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

BRIEF OF APPELLANT CHARLES R. EVANS

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ASSIGNMENT OF ERROR
INCLUDING ISSUES PRESENTED FOR REVIEW
& PAGE REFERENCES TO THE RECORD WHERE
THE ERROR OCCURRED

ASSIGNMENT OF ERROR:

The Trial Court Erred Denying Appellant Subject Matter Jurisdiction for Declaratory Judgment of R.C. §3109.04; R.C. §3109.043, and Civil Rule 75(N) {hereinafter: “Ohio’s Statutory Scheme”}; jointly, severally, and in *pari materia* pursuant to the substantive parental and associative parental rights expressly denied by Ohio’s statutory scheme:

- (A) Where the parties for declaratory judgment are substantially different and where the State of Ohio is the sovereign authority in the enactment and enforcement of Ohio’s express statutory scheme and not a party to the underlying divorce.
- (B) Where declaration of the constitutionality of Ohio’s statutory scheme is not the “exact same action” pending in the underlying divorce and where there is no equally serviceable remedy available.
- (C) Where there are no special statutory proceedings or an equally serviceable remedy available for challenging interlocutory orders and where the domestic court has failed to set an evidentiary hearing to address substantive parental and associative rights deprivations.

PAGE REFERENCE TO THE RECORD WHERE THE ERROR OCCURRED:
JANUARY 12, 2009 DECISION & ENTRY

STATEMENT OF THE CASE & FACTS

On or about January 29, 2007, Defendant-Appellee Carol M. Davis filed a petition for divorce. The January 12, 2009 trial court Decision and Entry improperly accepted the Defendant-Appellee State of Ohio’s incorrect assertion that a pending divorce is before Judge Preisse and “the dispute plaintiff complains of is regarding the parenting order issued by Judge Dana Preisse.”

Defendant-Appellee State of Ohio’s statements are factually incorrect. The trial court ignored the facts in Plaintiff-Appellant’s pleadings and First Amended Complaint. This is not uncommon in pro se represented cases. See recent article addressing pro se filings in Exhibit 1.

The pending divorce is not before Judge Preisse; it was assigned to a visiting judge who, without an evidentiary hearing, issued an interlocutory order in November

2008 requiring Plaintiff-Appellant to submit to supervised visitation of Collin Evans (DOB Oct. 26, 1998). Plaintiff-Appellant was the stay-at-home parent for Collin Evans, however, without an evidentiary hearing and finding of fact, the previous assigned judge arbitrarily restricted, without any legal basis, Plaintiff-Appellant's parental and associative rights. Plaintiff-Appellant requested her voluntary recusal where she complied due to the fact that there has not been a single hearing in over 2 years since the divorce was filed, a substantive procedural defect in the pending divorce. This defect is further enhanced by the fact that Plaintiff-Appellant has filed numerous requests in the record for an evidentiary hearing where Plaintiff-Appellant's substantive parental rights have been unequivocally denied throughout the pendency of the divorce proceeding. See First Amended Complaint.

The divorce court has not held a hearing, and as of this filing, and upon repeated filed requests, refuses to set an evidentiary hearing. Plaintiff-Appellant has no remedy under Ohio's statutory scheme. The trial court's blind acceptance of the Defendant-Appellee State of Ohio's incorrect assertions is disturbing.

Trial Court Conclusion:

The trial court issued its DECISION AND ENTRY on January 12, 2009 concluding "the exact same action remains pending" in the divorce court and "the two cases involve substantially the same parties" and dismissed Plaintiff-Appellant's Complaint pursuant to Civ.R. 12(B)(1) and 12(B)((6).

The trial court ignored the fact that the cases involve distinct claims, citing "the exact same action remains pending" and different parties.

LAW & ARGUMENT

ASSIGNMENT OF ERROR:

The Trial Court Erred Denying Appellant Subject Matter Jurisdiction for Declaratory Judgment of R.C. §3109.04; R.C. §3109.043, and Civil Rule 75(N) {hereinafter: "Ohio's Statutory Scheme"}; jointly, severally, and in *pari materia* pursuant to the substantive parental and associative parental rights expressly denied by Ohio's statutory scheme:

(A) Where the parties for declaratory judgment are substantially different and where the State of Ohio is the sovereign authority in the enactment and enforcement of Ohio’s express statutory scheme and not a party to the underlying divorce.

Substantially Different Parties

The pending divorce is a request for a decree of divorce between the parties for the division of marital property and to establish the relationship of minor children of the marriage. The parties to the divorce are the persons married to each other. The State of Ohio is not a party in the divorce.

Plaintiff-Appellant’s constitutional challenge to Ohio’s statutory scheme for declaratory relief is not the “same exact action” as a divorce. It is presumed that Ohio’s statutory scheme is constitutional as written and that it operates constitutionally as applied in Ohio divorces. Generally, “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 ‘[i]f the second case is not for the same cause of action, nor between the same parties, the former suit will not prevent the latter.’” *State ex rel. Sellers v. Gerken* (1995), 72 Ohio St.3d 115, 117.

A declaratory judgment action requires naming the State of Ohio as a proper party where the sovereign authority to enact and enforce the statutory scheme rests solely with State of Ohio. The declaratory judgment statute further requires naming any person affected in a declaration for relief, therefore, Plaintiff-Appellant is statutorily required to name Defendant-Appellee Davis as a party in the instant matter.

Where a declaratory challenge to Ohio law requires naming the State of Ohio as a proper party, the pending divorce does not.

The two cases do not “involve substantially the same parties”.

(B) Where declaration of the constitutionality of Ohio’s statutory scheme is not the “exact same action” pending in the underlying divorce and where there is no equally serviceable remedy available.

Difference in Legal Actions: Declaratory Judgment v. Divorce Proceeding

The facial language of Ohio’s statutory scheme explicitly lacks (and expressly denies) fundamental protections for parents in a divorce with children. The jurisdictional

priority rule applies only if the claims in both cases are “sufficiently similar” and if there are cases pending in two different courts of concurrent jurisdiction involving substantially the same parties.

Three elements are required in order to pursue a declaratory judgment action as an alternative to other remedies, which in the instant matter there are no alternative remedies at law: “(1) a real controversy must exist between the parties; (2) which is justiciable in nature; and (3) speedy relief is necessary to the preservation of rights that may otherwise be impaired or lost.” *Fairview General Hospital v. Fletcher* (1992), 63 Ohio St.3d 146, 148-149.

Plaintiff-Appellant asserts that no remedy exists for any Ohio parent under any set of circumstances where the explicit language in the statutory scheme denies fundamental procedural requirements, *i.e.*, an evidentiary hearing.

“Nevertheless, the availability of another remedy is not the test. The trial court must determine that the other available remedy is “equally serviceable” before it can dismiss the declaratory judgment action.” *Swander Ditch Landowners’ Assn. v. Joint Bd. of Huron & Seneca Cty. Commrs.* (1990), 51 Ohio St.3d 131, 135. In the domestic case there is no available remedy for a hearing and certainly not a remedy that is equally serviceable. The trial court did not address the fact that there is no equally serviceable remedy for Plaintiff-Appellant where a hearing is not available pursuant to written request.¹

In *Swander, id.* the Ohio Supreme Court stated that a given plaintiff is not always required to exhaust *administrative* remedies before bringing a declaratory judgment action,. However, the court also held that declaratory relief is not available where another equally serviceable remedy has been provided. *Id.*, citing *Radaszewski v. Keating* (1943), 141 Ohio St. 489.

Plaintiff-Appellant has *neither* an administrative remedy *nor* another equally serviceable remedy in the trial court. There is no remedy at law where there is no ability to achieve an evidentiary hearing.

¹ Timeliness is at issue and Plaintiff-Appellant asserts that an equally serviceable remedy regarding deprivation of substantive rights must meet some minimum time requirement. Ohio’s statutory scheme does not provide a remedy at law. At present, there is no hearing scheduled, although requested numerous times in the record, and there has been no evidentiary hearing since the divorce was filed in January 2007.

A request for declaratory relief of the express language of Ohio's statutory scheme is not "the exact same action pending before Judge Preisse", *i.e.*, a divorce action.

Plaintiff-Appellant has no administrative remedy. There is no equally serviceable remedy where the domestic court will not set an evidentiary hearing pursuant to his Civ. R. 75(N) request.

(C) Where there are no special statutory proceedings or an equally serviceable remedy available for challenging interlocutory orders and where the domestic court has failed to set an evidentiary hearing to address substantive parental and associative rights deprivations.

An interlocutory order is not a final appealable order. (Citations omitted.) Plaintiff-Appellant's request for a hearing pursuant to Civ.R. 75(N) remains pending and while requested in the domestic case record numerous times, has never been scheduled, and therefore, no remedy at law exists in the domestic matter for modification. No final hearing has been set, and therefore no remedy at law exists for adjudication of Plaintiff-Appellant's substantive deprivation. The purpose of the Declaratory Judgment Act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Radaszewski, id.* @ 96.

The trial court cites *In re Guardianship of Campbell* (March 31, 2006), Mahoning App. No. 05 MA 10, 2006 Ohio Lexis App. 1614 as to whether the declaratory judgment action would interfere with the domestic court's jurisdiction to hear Plaintiff-Appellant's claim. First, a guardianship hearing was conducted in *In re Guardianship of Campbell, id.*, a significant factual distinction from Plaintiff-Appellant's failure to be granted an evidentiary hearing in the instant matter. Second, the probate court concluded "that the domestic relations court was vested with continuing exclusive jurisdiction over Jay Campbell due to the prior shared parenting agreement and Jay's continuing disability." *Id.* @ 10. The "prior shared parenting agreement" is a final appealable order.

A remedy at law exists in appeal, which remedy does not exist for Plaintiff-Appellant in the instant matter. *In re Guardianship of Campbell* is not binding in Franklin County, and most importantly, is not on point.

In the instant matter, there is a significant difference from Judge Lynch's cited authority where Plaintiff-Appellant has been denied all remedies at law, and importantly,

where there is no ability to challenge an interlocutory order where the domestic court refuses to set a continuing and requested hearing date.

Finally, Plaintiff-Appellant does not have an administrative remedy for the preservation of his rights. “Additionally, appellant is always free to appeal an adverse decision by the board to the court of common pleas pursuant to R.C. Chapter 119. Finally, considering that the administrative hearing was already scheduled at a date bound to be earlier than one to be scheduled for the declaratory judgment hearing, appellant failed to establish an essential element required for declaratory relief. Namely, appellant could not establish that a speedy relief is necessary to the preservation of her rights, or that relief would be more speedy by utilizing the declaratory judgment route.” *Mack v. Ohio St. Dental Board*, (Tenth Appellate District 2001), Case No. 00AP-578.

Need for Speedy Relief Established in First Amended Complaint

First, there is no immediate remedy in the domestic case because there is no ability to achieve a hearing. Further, Plaintiff-Appellant established in his pleading that speedy relief is necessary to the preservation of his rights. See First Amended Complaint @ para. 60, 68, & 92-95.

In fact, the entire First Amended Complaint is about the preservation of Plaintiff-Appellant’s rights, the essence of the declaratory judgment action. The trial court’s cursory review has *further eroded* Plaintiff-Appellant’s speedy relief necessary in a declaratory judgment action. Additionally, pursuant to Civ.R. 57, Plaintiff-Appellant requested the trial court advance the hearing for declaratory judgment on the trial list. See First Amended Complaint @ para. 3-4.

The remedy of speedy relief was denied by the trial court where Plaintiff-Appellant established the need for the preservation of his rights in the First Amended Complaint.

PAGE REFERENCE TO THE RECORD WHERE THE ERROR OCCURRED:
JANUARY 12, 2009 DECISION & ENTRY

CONCLUSION

Plaintiff-Appellant respectfully requests that the decision of the trial court be REVERSED where the jurisdictional priority rule is improperly applied to this matter.

Regardless that the domestic case was filed first, the two cases involve 2 entirely different requests for relief. A request for declaratory relief does not interfere with the establishment of Plaintiff-Appellant's rights in a divorce where there is no remedy at law to determine the substantive rights of the divorcing parties. The trial court failed to address that Plaintiff-Appellant had an equally serviceable remedy available before dismissing the declaratory judgment action.

Finally, the trial court maintains jurisdiction where the parties are not substantially the same and Defendant-Appellee State of Ohio is the proper party to defend the express constitutionality of Ohio's statutory scheme pursuant to R.C. §2721.01- §2721.16.

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REQUEST FOR ORAL HEARING

Appellant, Charles R. Evans, requests to participate in Oral Hearing as specified pursuant to Local Appellate Rule 10.

Charles R. Evans

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of Appellant was served upon all parties or their counsel by ordinary mail, postage paid at Columbus, Ohio, on the 11th day of March 2009.

Charles R. Evans