

CUYAHOGA COUNTY COURT OF COMMON PLEAS  
DOMESTIC RELATIONS DIVISION  
CLEVELAND, OHIO

2010 JUL 20 P 12:16

GERALD E. FUERST  
CLERK OF COURTS  
CUYAHOGA COUNTY

Paul Neumann )  
24243 Lebern Drive )  
North Olmsted, OH 44070 )

Paul Neumann, on behalf of his minor )  
child, Grace Neumann )  
**PLAINTIFFS** )

vs. )

The State of Ohio )  
c/o Richard Cordrey, Attorney General )  
30 East Broad Street, 17<sup>th</sup> Floor )  
Columbus, Ohio 43215, )

Pamela Neumann )  
27668 B Caroline Circle )  
Westlake, OH 44145 )

Cuyahoga County Common )  
Pleas Court )  
1200 Ontario Street )  
Cleveland, Ohio 44113-1678 )

Judge Cheryl S Karner )  
c/o Cuyahoga County Common )  
Pleas Court )  
Domestic Relations Division )  
One West Lakeside Avenue )  
Cleveland, Ohio 44113 )

Heather Corso )  
1220 West 6th Street, Suite 502 )  
The Bradley Building )  
Cleveland, Ohio 44113 )

Cuyahoga County CSEA )  
1640 Superior Ave. East )  
P.O. Box 93318 )  
Cleveland, Ohio 44101 )

**DEFENDANTS, et al.** )

**CASE NO. CV-10-722398**  
**Judge TIMOTHY MCCORMICK**

**MEMORANDUM CONTRA**  
**TO Pamela Neumann**  
**MOTION TO DISMISS**

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**MEMORANDUM CONTRA TO DEFENDANT PAMELA NEUMANN'S MOTION TO  
DISMISS**

Plaintiff Paul Neumann files his Memorandum Contra to the Defendant Pamela Neumann'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 Defendant Pamela Neumann 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 Defendant Pamela Neumann requested dismissal pursuant to Civil Rule 12(B) (6).

Where parental and associative rights are substantive rights, Plaintiff's 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 Complaint asserts Ohio's statutory scheme is expressly unconstitutional on its face. Where constitutionally-protected parental rights are implicated under state law the Complaint asserts Ohio's statutory scheme is unconstitutional as written under federal law and violates the supremacy clause [Article IV]. The Complaint asserts that Plaintiff was denied an evidentiary hearing where Plaintiff's parental rights were implicated. The Complaint asserts Plaintiff was denied his parental rights and right to custody of Plaintiff Grace Neumann, which reciprocal associative rights were further restricted without an express constitutionally compliant evidentiary standard. The Complaint asserts the state's evidentiary standard must be strictly construed under federal law. The Complaint asserts Plaintiff was denied an evidentiary hearing to modify the deprivation of his parental rights by a state court order [filed February 2010] upon Plaintiff's motion to modify the

deprivation of his parental rights filed in the court record. The Complaint asserts Plaintiff's deprivations of his fundamental parental rights are capable of repetition and evade review.

The Complaint asserts that the state court has never held an evidentiary hearing in the 10 months since the divorce case was filed by Defendant Pamela Neumann in September 2009, 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 Complaint asserts Plaintiff has no remedy under Ohio's statutory scheme. The 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.

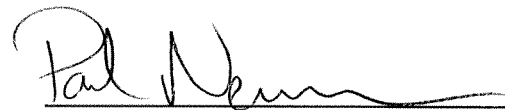
The Complaint asserts that the state court has never held an evidentiary hearing in the 9 months since the divorce case was filed as why the plaintiff has been denied his personal property and unduly deprived of his personal property The Complaint asserts that the state court has never held an evidentiary hearing in the 9 months since the divorce case was filed in September 2009, however, Plaintiff was deprived of his property without due process of law by the state court without any finding of fact and where there are no express due process requirements in the statutory scheme. The Complaint asserts Plaintiff has no remedy under Ohio's statutory scheme. The 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. without any finding of fact and where there are no express due process requirements in the statutory scheme. The Complaint asserts Plaintiff has no remedy under Ohio's statutory scheme. The 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 Defendant Pamela Neumann'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,

 7/30/2016  
Paul Neumann

## 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 but is Division of the Court of Common Pleas and there fore does 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 Pamela Neumann and Defendant Paul Neumann [captioned Neumann v Neumann in pending divorce]. In the instant declaratory action, the parties are Plaintiff Paul Neumann, 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 Pamela Neumann 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 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 year. 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 Paul Neumann cannot appeal an interlocutory order. Since the divorce was filed in September 2009, 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 complicity of the Defendant Pamela Neumann and Pamela Neumann’s counsel who have willfully withheld the Plaintiff’s daughter by refusing any communications. The Defendant Pamela Neumann has helped with this by failing to respect the equal standing of the Plaintiff by not allowing equal custody until issues can be decided properly. This decision on the part of Defendant Pamela Neumann has denied the Plaintiff Grace Neumann her guaranteed 1<sup>st</sup> Amendment associative rights in respect to her relationship with her father Plaintiff Neumann.

**In a January 2010 Plaintiff was denied an evidentiary hearing.** Where temporary orders are interlocutory in nature, interlocutory orders are not appealable and no temporary order was journalized by the court. Defendant Pamela Neumann with, by and thru her council Heather Corso has denied Plaintiff Paul Neumann and visitation with his Daughter plaintiff Grace Neumann, including on her recent 5<sup>th</sup> Birthday.

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. The same holds true for the Plaintiff Grace Neumann as she will never be able to recover the lost time with her father.

**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.

Defendant Pamela Neumann 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 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, 10 months is not "temporary". The Court's filed entry denying Plaintiff's filed motion requesting an evidentiary hearing [February 2010] 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 9 months **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 9 months 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 March 26, 2010, 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] yet no hearing on this matter has been held and the Plaintiff has been denied his relationship with his Daughter.

### **Jury Trial Endorsed Hereon**

Plaintiff Paul Neumann 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)**

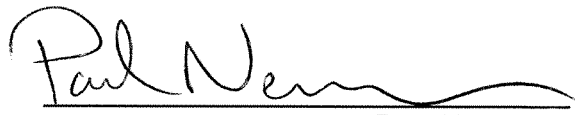
"This case raises some very interesting constitutional questions about the fundamental rights of parents in child custody proceedings. The questions are so

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.]

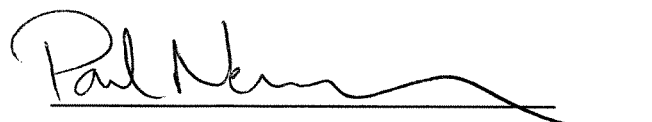
The federal declaratory judgment matter addressed in *Galluzzo*, the constitutional challenge to Ohio's custody statutory scheme, is now in the proper state forum to argue the constitutional questions about the fundamental rights of parents in child custody proceedings.

**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.

  
Paul Neumann

**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 Cleveland, Ohio, on the 30 day of July 2010.

  
Paul Neumann