

**IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO**

Erik Louis Smith	:	
518 E. Town Street, #308	:	
Columbus, OH 43215,	:	
Plaintiff	:	Case No: 04-CVD-05-4975
v.	:	Judge _____
Tom Hayes, Director	:	<b>FIRST AMENDED COMPLAINT FOR</b>
Ohio Department of Job and Family Services	:	<b>DECLARATORY JUDGMENT AND</b>
30 East Broad St., 32nd Floor	:	<b>REQUEST FOR INJUNCTIVE</b>
Columbus, OH 43215	:	<b>RELIEF</b>
In his Official Capacity,	:	
Defendant	:	

**PARTIES**

1. Plaintiff, Erik L. Smith, a resident, taxpayer, and citizen of the state of Ohio, brings this claim as a public action and an action under R.C. 2721.
2. Defendant, Tom Hayes, is Director of the Ohio Department of Job and Family Services (“ODJFS”) a state entity that oversees programs providing services to families and children and ensures that the services are implemented and conducted in a manner that preserves individual rights, responsibilities, and dignity. Tom Hayes is sued in his official capacity.

**FACTS AND BACKGROUND**

3. On about April 9, 2001, the Desertion of Child Under 72 Hours Old Act (hereafter “desertion of child scheme”) went into effect, codified at R. C. 2151.3515-.3530.
4. Under the desertion of child scheme, any parent, married or unmarried, can, for any reason, free from intrusion, pursuit, and criminal prosecution, surrender their unharmed three-day-old or younger child with hospital employees, emergency medical service providers, or peace officers anonymously. If found to be deserted, the child is treated as a neglected child in

temporary custody proceedings in Juvenile Court. Permanent custody to children's services or a private agency may result.

5. At least twenty newborns have been deserted under the desertion of child scheme.
6. ODJFS has launched a campaign to promote the desertion of child scheme, including opinion pieces, public service announcements, posters, brochures, and a "safe haven" website.
7. The desertion of child scheme circumvents notice requirements and serves no purpose independent from other statutes except to authorize and encourage secrecy in adoptions.
8. This has injured, and will continue to injure, non-relinquishing parents and their deserted children by denying them their constitutional rights.
9. Plaintiff seeks invalidation of the statutes in the desertion of child scheme that give rise to this violation and enable the injury to occur. Alternatively, plaintiff seeks invalidation of R. C. 2151.3515-3530 in toto. Plaintiff seeks injunctive relief to prevent present and further injury.
10. Plaintiff attaches a copy of R. C. 2151.3515 through 2151.3530 to his complaint as Exhibit "A" and incorporates it by reference.
11. Plaintiff bases his complaint on several separate clauses and sections of the Ohio Constitution as set forth in the following claims.

FIRST CLAIM: SEPARATION OF POWERS

12. Paragraphs 1 through 11 are hereby repeated in full.
13. R. C. 2151.3524(A) Parent's right to anonymity, states:  
  
(A) A parent who voluntarily delivers a child under section 2151.3516 [2151.35.16] of the Revised Code has the absolute right to remain anonymous....A parent who voluntarily delivers a child may leave the place at which the parent delivers the child at any time after the delivery of the child.
14. Under R. C. 2151.3527(A), no agent receiving a child may:  
  
(1) Coerce or otherwise try to force the parent into revealing the identity of the child's

parents;

(2) Pursue or follow the parent after the parent leaves

15. Per R. C. 2151.3519 and R. C. 2151.3528, where the deserting parent remains anonymous and non-informative, a Juvenile Court may forego all notice to the non-relinquishing parent and must require DNA testing for any reunification between the child and parent.

16. Article II, Section 32 of the Ohio Constitution states:

The general assembly shall grant no divorce, nor exercise any judicial power not herein expressly conferred.

17. Article IV, Section 5(B) of the Ohio Constitution states in relevant part:

The Supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right....All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Plaintiff grieves that the desertion of child scheme conflicts with Court rules and constitutes exercise of judicial power by the legislature.

18. Under Juvenile Rule 13(B)(3), and (E), temporary orders concerning the care of the child may be granted ex parte if the best interest and welfare of the child require immediate issuance. However, the Court shall give written notice of the hearing by means reasonably likely to result in the party's receiving actual notice. Where the Court has proceeded without notice, it shall, wherever possible, give notice of the action it has taken to the parties and any other affected person and provide them an opportunity for a hearing concerning the continuing effects of the action.

19. Juvenile Rule 15 states in relevant part:

(A) Summons: issuance. After the complaint has been filed, the court shall cause the issuance of a summons directed to the child, the parents, guardian, custodian, and any other persons who appear to the court to be proper or necessary parties.

20. Juvenile Rule 16, section (A), states in relevant part:

Except as otherwise provided in these rules, summons shall be served as provided in Civil Rules 4(A), (C) and (D), 4.1, 4.2, 4.3, 4.5 and 4.6....

Except as otherwise provided in this rule, when the residence of a party is unknown and cannot be ascertained with reasonable diligence, service shall be made by publication...Before service by publication can be made, an affidavit of a party or party's counsel shall be filed with the court. The affidavit shall aver that service of summons cannot be made because the residence of the person is unknown to the affiant and cannot be ascertained with reasonable diligence and shall set forth the last known address of the party to be served.

Plaintiff attaches a copy of Juvenile Rules 13, 15 and 16, and Civil Rules 4(A), (C) and (D), 4.1, 4.2, 4.3, 4.5 and 4.6 to his complaint as Exhibit "B" and incorporates them by reference.

21. The Supreme Court of Ohio has ruled that, due to the relationship between parents and children, and because of the social consequences involved, a Juvenile Court cannot make a valid order changing temporary commitment of a child to a permanent commitment without service of notice upon the parent, strictly in accordance with the law. The Court has also held that the lack of sufficient notice of a permanent-custody proceeding renders a Juvenile Court judgment void ab initio and makes an ensuing claim cognizable in habeas corpus. *Ross v. Saros*, 99 Ohio St.3d 412, 2003-Ohio-4128; *In re Frinzl* (1949), 152 Ohio St. 164.

22. The Supreme Court of Ohio has re-affirmed that, under Civil Rule 4(A), a plaintiff must exercise reasonable diligence in attempting to locate a defendant in a civil proceeding, including Juvenile proceedings; and that where such diligence proves ineffectual, must provide service by publication under Civil Rule 4(A). *Sizemore v. Smith* (1983), 6 Ohio St.3d 330; *In re Frinzl* (1949), 152 Ohio St. 164.

23. R. C. 2151.3524(A) and R. C. 2151.3527(A) violate the doctrine of separation of powers, in the following ways:

a. Substantially conflicting with Juvenile Rules 13, 15 and 16 for providing for

adequate service on, and notice to, the child's other parent. The statutes eliminate the need to exercise reasonable diligence in locating and identifying other substantially interested parties. The statutes also divest the Court of its authority to order a party to exercise reasonable diligence in locating and identifying the non-relinquishing parent or putative father;

b. Directly opposing Ohio Supreme Court precedent;

c. Legislating an exception to notice requirements that is not strictly construed so as to protect the right of parents to raise and nurture their children;

d. Interfering with the Court's power to regulate Court procedure and make informed dispositions about a child's welfare, including her relationship to her parents and whether the parties entered into an improvident or unenforceable contract;

24. The above violations of the separation of powers injure the public substantially and inherently. This injury will continue and increase in the future.

25. The people have no remedy except to seek invalidation of R. C. 2151.3524(A) and R. C. 2151.3527(A) specifically, or the desertion of child scheme in toto, and to seek injunctive relief.

#### SECOND CLAIM: PROCEDURAL DUE PROCESS

26. Paragraphs 1 through 25 are hereby repeated in full.

27. Article I, Section 16 of the Ohio Constitution states in relevant part:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law...

28. The desertion of child scheme, particularly R. C. 2151.3524(A), 2151.3527(A), and 2151.3528 violate the right to procedural due process guaranteed under Section 16, Article 1 of the Ohio Constitution in the following ways:

a. Working directly to thwart a non-relinquishing parent's right to receive notice and

be heard in a legal proceeding regarding his/her child;

b. Not stating a complaint for neglect;

c. Putting an onerous burden on the non-relinquishing parent to obtain access to the Court (DNA testing);

d. Not substantially advancing the interest of child safety;

e. Rendering putative father registry search impossible or fruitless, thus denying putative fathers notice on the sole ground that the putative father is unknown or knew nothing of the child, despite having signed the putative father registry pursuant to R. C. 3107.061;

f. Prohibiting the person receiving the anonymously deserted child from exercising the diligence necessary to afford actual notice to the non-relinquishing parent where the means to that information is immediately at hand;

g. Proceeding to a child's best interest hearing and irrationally establishing the presumption that the child's best interest is served by not returning the child to the non-relinquishing parent;

h. Ignoring feasible, less restrictive alternatives to anonymity for ensuring the safety of newborns and of expediting adoptions and Juvenile proceedings, e. g. applying the confidentiality standards available in traditional adoption or neglect proceedings;

i. Eliminating the non-relinquishing parent's remedy before she knows of injury by requiring the non-relinquishing parent to secure her own notice to the Court proceeding;

j. Being insufficiently related to any compelling state interest that would require undermining a parent's fundamental and inviolate right to actual notice of an adoption or custody proceeding involving his/her child where the parent has grasped the opportunity to receive actual notice and the means to actual notice are at hand for the petitioner or his agent;

- k. Forcing a presumed parent to re-establish presumed parenthood;
  - l. Eliminating the right to access witnesses, evidence, and to cross-examine the evidence against oneself.
  - m. Establishing an improvident, illegal, and unenforceable contract.
29. No adequate remedy, supplemental or otherwise, except the declaratory and injunctive relief plaintiff seeks, is available to the plaintiff or the public.

THIRD CLAIM -- SUBSTANTIVE DUE PROCESS

30. Paragraphs 1 through 29 are hereby repeated in full.
31. R. C. 2151.3516 requires the deserted child be seventy-two hours or less old.
32. R. C. 2151.3521 requires the Court to treat the deserted child as a neglected one regarding the temporary custody order, except that there is a rebuttable presumption that it is not in the child's best interest to return the child to either parent.
33. R. C. 2151.3523 grants the deserting parent criminal immunity if the child is unharmed.
34. R. C. 2151.3524(A), 2151.3527(A), and R. C. 2151.3528 are arbitrary and violate substantive due process in the following ways:
- a. Not advancing a legitimate state interest that would justify infringing so substantially on a parent's natural right to parent his/her child where less restrictive measures are available;
  - b. Being unenforceable when the relinquishing parent remains anonymous. The employee receiving the child may not be able to confirm the child's age, relationship to the delivering person, or even her citizenship;
  - c. Forcing a presumed parent to re-establish presumed parenthood;
  - d. Forcing the non-deserting parent to rebut a presumption that returning the child to

him/her opposes the child's best interest, where that presumption is based solely on the unilateral action of the deserting parent;

- e. Not stating a complaint for neglect;
- f. Allowing desertion for any reason at all, such as avoiding giving notice to the other parent or avoiding child support obligations;
- g. Unreasonably presuming that an anonymous desertion option would deter parents from harming their children more than the existing criminal laws, or the traditional voluntary surrender/adoption alternatives deter such action;
- h. Encouraging, and resulting in, extortion;
- i. Applying standards, and allowing for judicial results, substantially different from those that would be applied or reached under other chapters of the revised code under the same essential facts.
- j. Not rationally furthering any legitimate state interest.
- k. Establishing an improvident, illegal, and unenforceable contract.

#### FOURTH CLAIM -- EQUAL PROTECTION UNDER THE LAW

35. Paragraphs 1 through 34 are hereby repeated in full.

36. Article 1, Section 2 of the Ohio Constitution states:

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

37. Together with the remainder of the desertion of child scheme, R. C. 2151.3524(A) and 2151.3527(A) violate Article I, Section 2 of the Ohio Constitution in the following ways:

a. Applying standards, and allowing for judicial results, substantially different from those that would be applied or reached under other revised code chapters under the same essential facts.

b. Not stating a complaint for neglect;

c. Applying the law differently to one of two similarly situated parents;

d. Establishing an improvident, illegal, and unenforceable contract.

FIFTH CLAIM: FEDERAL PREEMPTION

38. Paragraphs 1 through 37 are hereby repeated in full.

39. The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1913(a-c) states:

“(a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge’s certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian....Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.”

40. 25 U.S.C. §§ 1912(a) states:

“In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary.”

41. ODJFS has publicly declared the following policy in determining the American Indian heritage of children relinquished:

“It is crucial that all birthparents be questioned about possible ties to any tribe so that the proper steps may be taken if that birthparent's parental rights are terminated.”

ODJFS at < [www.jfs.ohio.gov/oap/bk12.htm](http://www.jfs.ohio.gov/oap/bk12.htm) > Frequently Asked Questions (2).

42. The deserted child scheme conflicts irreparably with ICWA by giving birth parents an absolute right to withhold information required to make American Indian Tribal jurisdiction determinations, and by directly prohibiting the enforcement of 25 U.S.C. 1912(a) and 1913(a-c).

43. The deserted child scheme is thereby preempted by ICWA.

#### SIXTH CLAIM: ILLEGAL CONTRACT

44. Paragraphs 1 through 44 are hereby repeated in full.

45. The factual scenario anticipated in the deserted child scheme describes not neglect or abandonment, but contractual relinquishment, of a child.

46. The deserted child scheme's procedures, presumptions, and terms oppose Court rules and precedents regarding the law and the standards to apply in contractual relinquishments of children. Thus, the deserted child scheme represents an illegal contract, which ODJFS is charged with enforcing.

47. All of the above constitutional violations have harmed, and will continue to harm, deserted children and their non-relinquishing parents by denying them their constitutional rights.

48. No other adequate remedy is available to the public.

49. Because the desertion of child scheme affects the ability of all persons to grasp a fundamental right or interest without practical, timely, or non-onerous remedy, plaintiff's grievance demands immediate resolution and speedy relief.

50. The issues sought to be litigated are of great importance and interest to the public.

**WHEREFORE**, Plaintiff prays for judgment against Defendant as follows:

A. That this Court declare that R. C. 2151.3519, R. C. 2151.3524(A), R. C. 2151.3527(A),

and R. C. 2151.3528 violate the doctrine of separation of powers, equal protection, federal supremacy, and substantive and procedural due process; and if not severable, to declare 2151.3515 - 3530 unconstitutional in toto.

- B. That this Court issue preliminary and permanent injunctions prohibiting Defendant from implementing or enforcing R. C. 2151.3519, R. C. 2151.3521, R. C. 2151.3524(A), R. C. 2151.3527(A), R. C. 2151.3528, and the applicable administrative rules or any other statute in R. C. 2151.3515- 3530 working to provide anonymity or working against the ability of the county, the state, the Court, or their agents to exercise reasonable diligence in identifying or locating the child's parents;
- C. That this Court issue a mandatory injunction ordering Defendant to comply with Ohio Constitution Article I, Sections 2 and 16; Article IV, Section 5; and Juvenile Rules 13, 15, and 16, and the requirements of ICWA and other federal laws.
- D. That this Court issue a mandatory injunction ordering Defendant to direct all persons falling under R. C. 2151.3516 - .3517 to confirm the identity of persons deserting a child and to require the deserter to show they have a parental relationship to the child before the employee takes possession of the child, and that the employee report the identifying information to the agency assuming the next custody of the child;
- E. That this Court award Plaintiff his reasonable costs;
- F. For such other and further relief as the Court deems just and equitable.

Respectfully submitted,

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Columbus, OH 43215

Tel (614) 221-1827 (wk)  
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Plaintiff's Second Amended Complaint was served by regular U.S. mail, postage paid, on Tom Hayes, Director, Ohio Department of Job and Family Services, Legal Office, 30 East Broad St., 31st Floor, Columbus, OH 43215, and the Ohio Attorney General, Chief Counsel Staff, 30 East Broad St., 17th Floor, Columbus, OH 43215 on June 3, 2004.

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