

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

**ERIK L. SMITH**

**Plaintiff-Appellant,**

v.

**TOM HAYES, Director, Ohio Dept.  
of Job and Family Services**

**Defendant-Appellee**

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

**Appellate No. 04-APE-12--1321**

**Appeal from Franklin County**

**Court of Common Pleas**

**Case No. 04-CVH-05-4975**

**REGULAR CALENDAR**

---

**BRIEF OF APPELLANT**

---

**Counsel for Plaintiff-Appellant:**

Erik L. Smith  
518 E. Town St., #308  
Columbus, OH 43215  
Ph: (614) 221-1827  
edenstore@msn.com

Plaintiff-Appellant, Pro Se

**Counsel for Defendant-Appellee:**

OHIO ATTORNEY GENERAL  
Elise Porter (0055548)  
Assistant Attorney General  
Constitutional Offices Section  
30 East Broad Street, 17th Floor  
Columbus, OH 43215-3428  
(614) 466-2872

Attorney for Defendant-Appellee  
Tom Hayes, Director  
Ohio Dept. of Job and Family Services

TABLE OF CONTENTS

<b>TABLE OF AUTHORITIES .....</b>	<b>iii</b>
<b>ASSIGNMENT OF ERROR .....</b>	<b>vi</b>
<b>STATEMENT OF CASE .....</b>	<b>1</b>
<b>STATEMENT OF FACTS .....</b>	<b>2</b>
<b>ARGUMENT .....</b>	<b>4</b>
<b>I.    THE TRIAL COURT ERRED BY GRANTING THE           MOTIONS TO DISMISS .....</b>	<b>5</b>
<b>CONCLUSION .....</b>	<b>15</b>
<b>CERTIFICATE OF SERVICE .....</b>	<b>16</b>
<b>APPENDICES</b>	
1.    Order Granting Motions to Dismiss dated November 29, 2004	
2.    Plaintiff's First Amended Complaint	
<b>ADDENDUM</b>	
1.    Desertion of Child Under 72 Hours Old (DCA) -- R.C. 2151.3515-.3530	
2.    Administrative Rules	
3.    Juvenile Rules	

TABLE OF AUTHORITIES

<b>Case Law</b>	<b>Page</b>
<i>Armstrong v. Manzo</i> (1965), 380 U.S. 545 .....	12
<i>Bowers v. Ohio State Dental Bd.</i> (2001), 142 Ohio App.3d 376 (10th Dist.) .....	8
<i>Caban v Mohammed</i> (1979), 441 U.S. 380 .....	12
<i>Greeley v. Miami Valley Maintenance Contrs., Inc.</i> (1990), 49 Ohio St.3d 228 .	5
<i>In re Adoption of Greer</i> (1994), 70 Ohio St.3d 293 .....	6, 9
<i>In re Adoption of Knipper</i> (1986), 30 Ohio App.3d 214 .....	12
<i>In re Contemnor Caron</i> (2000), 110 Ohio Misc.2d 58 .....	10
<i>In re Corey</i> (1945), 145 Ohio St. 413 .....	12
<i>In re Hayes</i> (1997), 79 Ohio St.3d 46 .....	6, 9
<i>In re Schoeppner</i> (1976), 46 Ohio St.2d 21 .....	14
<i>Lehr v. Robertson</i> (1983), 463 U.S. 248 .....	12
<i>Lewis v Reed</i> (1927), 117 Ohio St. 152 .....	11
<i>Ohio Roundtable v. Taft</i> , 119 Ohio Misc.2d 49, 2002-Ohio-3669 .....	7, 8
<i>Reynolds v. Ross Cty. Children's Services Agency</i> (1983), 5 Ohio St.3d 27 .....	12
<i>Santosky v. Kramer</i> (1982), 455 U.S. 745 .....	6, 9
<i>State ex rel. Ohio Academy of Trial Lawyers v. Sheward</i> (1999), 86 Ohio St3d 451 .....	6, 7, 9, 13
<i>State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.</i> , 97 Ohio St.3d 504, 2002-Ohio-6717 .....	6, 7,
<i>State ex rel. Smith v. Smith</i> (1996), 75 Ohio St.3d 418 .....	12

<i>Tailford v. Bristline</i> (1917), 96 Ohio St. 581 .....	11
<i>Troxel v. Granville</i> (2000), 530 U.S. 57 .....	6, 9
<i>Vail v. Plain Dealer Publishing Co.</i> (1995), 72 Ohio St.3d 279 .....	5
<i>Williams v. Williams</i> (1975), 44 Ohio St.2d 28 .....	12

<b>Statutes</b>	<b>Page</b>
-----------------	-------------

R.C. 21513515 .....	1, 2, 4
R.C. 21513516 .....	2
R.C. 21513518 .....	2
R.C. 21513519 .....	2
R.C. 21513520 .....	2
R.C. 21513521 .....	2
R.C. 21513524 .....	2, 3, 6, 8, 10, 11, 13, 14
R.C. 21513527 .....	2, 3, 6, 10, 11, 13, 14
R.C. 21513528 .....	2
R.C. 21513530 .....	1, 4
R.C. 3107061 .....	14
R.C. 3107 064 .....	14
R.C. 310707 .....	14

<b>Administrative Rules</b>	<b>Page</b>
-----------------------------	-------------

OAC: 5101:2-1-01 .....	2
OAC: 5101:2-34-32.1 .....	2
OAC: 5101:2-42-04 .....	2
OAC: 5101:2-42-95 .....	2, 8, 10

<b>Court Rules</b>	<b>Page</b>
Juv.R. 13 .....	12, 13

Juv.R. 16 .....	13
-----------------	----

<b>Ohio Constitution Sections</b>	<b>Page</b>
-----------------------------------	-------------

Art. 1 § 16 .....	10
-------------------	----

<b>Other</b>	<b>Page</b>
--------------	-------------

ODJFS news release of November 15, 2004 .....	2
---	---

<a href="http://jfsohio.gov/safehavens">http://jfsohio.gov/safehavens</a> .....	15
---	----

**ASSIGNMENTS OF ERROR  
AND STATEMENT OF ISSUES**

**I. THE TRIAL COURT ERRED BY GRANTING  
DEFENDANT-APPELLEE'S MOTIONS TO DISMISS.**

(Decision and Entry Granting Defendant's Motion to Dismiss Filed June 4, 2004 and, Decision and Entry Granting Defendant's Second Motion to Dismiss Filed June 17, 2004, rendered November 23, 2004; reference Appendix 1)

- A. Where a plaintiff seeks to enforce or protect a public right, he need not show any legal or special individual interest in the result, it being sufficient that he is an Ohio citizen and, as a citizen, interested in the execution of the laws of Ohio.
  
- B. When the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties.

## STATEMENT OF CASE

On May 7, 2004, appellant, Erik Smith, alleging a public action, asked the Common Pleas Court to declare R. C. 2151.3515 - .3530, the Desertion of Child Under 72 Hours Old Act, (DCA) unconstitutional. (Complaint attached as Appendix 2) The DCA lets any parent, married or unmarried, for any reason, surrender their unharmed newborn to the state anonymously. Smith complained that this violated the separation of powers doctrine, due process, and equal protection. Smith asked the court to enjoin appellee, Tom Hayes, director of The Ohio Department of Job and Family Services, from enforcing the act and to follow constitutional law. On June 3, 2004, Smith amended his Complaint, adding claims of federal pre-emption and illegal contract (Comp. 12-49). Smith also added that the DCA violated the separation of powers doctrine, due process, and equal protection by being an illegal, unenforceable, or improvident contract. (Comp. 23d, 28m, 34k, 37d).

On June 4, 2004, Hayes moved to dismiss the original Complaint, arguing Smith lacked standing. On June 17, 2004, Hayes moved to dismiss the Amended Complaint. Smith filed Memoranda Contra both motions. Hayes replied. Smith filed a surreply. The trial court stayed discovery.

On November 23, 2004, the trial court granted Hayes' motions to dismiss, finding Smith lacked standing. (Order) The Order was filed on November 29, 2004. On December 9, 2004, Smith filed his notice of appeal.

## **STATEMENT OF FACTS**

The DCA lets any parent, married or unmarried, for any reason, permanently surrender their unharmed, biological three-day-or-less old child to an emergency medical service worker, peace officer, or hospital employee, anonymously. (RC. 2151.3515, 3516, 3524, 3527; OAC: 5101:2-1-01). The surrendering parent may withhold both parents' identities and leave the area immediately. R.C. 2151.3524(A) and .3527(A). Children's services takes emergency custody of the child, and must move for temporary custody within 24 hours. R.C. 2151.3518-19; OAC: 5101:2-42-04(C). The surrender, without more, fulfills the requirements for granting temporary custody to the agency. R.C. 2151.3515(A), 3519-.3520. A permanent custody request is mandatory. OAC: 5101:2-42-95(A)(2). Meanwhile, physicians examine the child for abuse or neglect, and Children's Services requests searches of missing child databases. OAC: 5101:2-34-32.1(A)(4)(b) and (B)(4).

Where the surrendering parent has withheld the parents' names and addresses, no notice of the temporary custody hearing is required. R.C. 2151.3519. To contest, a non-relinquishing parent must discover the surrender on their own, pay for DNA testing, and rebut a presumption that reunification opposes the child's best interest. R.C. 2151.3521 and .3528. By June 2003, at least twenty newborns had been deserted under the DCA. (Comp. 5) By November 2004, thirty infants had been legally deserted (ODJFS news release. <http://jfs.ohio.gov/releases/rl111504.stm>.)

Smith's Complaint included the following allegations: The DCA lets any biological parent, for any reason, surrender their unharmed newborn to the state anonymously. (Complaint at 4) Smith is a citizen, resident, and taxpayer of Ohio. (Comp. 1) The DCA circumvents notice requirements and serves no purpose independent from other



statutes except to authorize and encourage secrecy in adoptions. (Comp. 7) ODJFS has launched a campaign to promote the DCA. (Comp. 6) The DCA has harmed, and will continue to harm, non-relinquishing parents and children by denying them their constitutional rights to notice in proceedings affecting their parental rights. (Comp. 8-9, 23(c), 28(a), 47). The DCA violates the separation of powers by circumventing court rules and directly opposing longstanding Supreme Court precedents. (Comp. 12-23) This injures the public substantially and inherently. (Comp. 24) The people have no remedy except to seek invalidation of R. C. 2151.3524(A) and R. C. 2151.3527(A), or of the desertion of child scheme in toto, and to seek injunctive relief (Comp. 25) 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 (Comp. 49) The issues involved are of great public importance and interest. (Comp. 50). Plaintiff needs to seek injunctive relief to prevent present and further injury. (Comp. 9 and relief A - F)

The trial court found that Smith did not assert "facts implicating plaintiff's interest even tangentially to the DCA" and that "plaintiff's assertion of hypothetical outcomes that do not relate even tangentially to plaintiff is not the type of rare exception contemplated by the Ohio Supreme Court to permit this court to find that plaintiff has standing as a matter of public policy to maintain this action." (Order at 4) The trial court did not state what made the outcomes "hypothetical," except to cite Smith's allegation that the DCA injures, and has injured, non-relinquishing parents, their deserted children, and the public substantially and inherently. (Id.)

## **ARGUMENT**

The Desertion of Child Under 72 Hours Old Act (DCA), codified under R.C. 21513515 - .3530, allows any parent, for any reason, to surrender permanently their unharmed, three-day-or-less old infant to the state anonymously.

The issue is whether the DCA involves a public right that Smith can enforce. The public right involved is every Ohio citizen's right to know that the state will not help one parent deprive the other parent of notice of a proceeding affecting their parental rights. The people also have a great interest in keeping the power to give notice in those proceedings in the courts and not in the hands of one parent or the General Assembly.

Anonymity thwarts those interests by rendering the court unable to give parents, particularly the non-surrendering parent, notice of the temporary and permanent custody hearings. This contravenes the juvenile rules, nullifies decades of Supreme Court precedent, and shields the legislation from judicial review. Smith pled Ohio citizenship and that "because the desertion of child scheme affects the ability of all persons to protect their fundamental right to notice in a custody or parental rights proceeding without practical, timely, or non-onerous remedy, plaintiff's grievance demands immediate resolution." Thus, Smith is related to the public right, and as a citizen is affected by this law. The issues are of great public importance because the DCA affects a fundamental right, has wide applicability, divests the courts directly and broadly of judicial power, and involves state action. Thus, this Court should reverse.

**I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S MOTIONS TO DISMISS.**

**Standard of Review**

The Appellate Court reviews the motion to dismiss de novo. *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, 229. The Court accepts the Complaint's alleged facts as true, and affords the complaining party all reasonable inferences possibly derived from them. *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 280. To uphold the dismissal, it must appear certain the nonmoving party can prove nothing entitling him to relief. *Id.*

**IA. Where a plaintiff seeks to enforce or protect a public right, he need not show any legal or special individual interest in the result, it being sufficient that he is an Ohio citizen and, as a citizen, interested in the execution of the laws of Ohio.**

The public interest at stake here is every Ohio citizen's right to know--before they even beget children--that the state will not help the other parent deprive them of notice of a proceeding affecting their parental rights. The people also have a great interest in keeping the power to give notice to parents in the juvenile court and not in the hands of one parent or the General Assembly.

Smith alleged the following: The DCA lets any biological parent, for any reason, permanently surrender their unharmed newborn to the state anonymously. (Complaint at 4; See also Dismiss Motion at 2) Smith is a citizen, resident, and taxpayer of Ohio. (Comp. 1) The DCA circumvents notice requirements and serves no purpose independent from other statutes except to authorize and encourage secrecy in adoptions. (Comp 7) The DCA has harmed, and will continue to harm, non-relinquishing parents and children by denying them their constitutional rights to notice in proceedings affecting their parental rights. (Comp. 8, 23(c), 28(a), 47). The DCA

violates the separation of powers by circumventing court rules and directly opposing longstanding Supreme Court precedents. (Comp. 12-23) This injures the public substantially and inherently (Comp. 24) The people have no remedy except to seek invalidation of R.C. 2151.3524(A) and R.C. 2151.3527(A), or of the desertion of child scheme in toto, and to seek injunctive relief. (Comp. 25, 48)

The parent-child relationship is a bond that constitutes one of the most fundamental relationships upon which our society is based. *In re Adoption of Greer* (1994), 70 Ohio St.3d 293, 297. The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court. *Troxel v. Granville* (2000), 530 U.S. 57, 65. The importance holds even where blood relationships are strained. *Santosky v. Kramer* (1982), 455 U.S. 745, 752-754. Because termination of parental rights is the “death penalty” of family law, parents must be afforded every procedural and substantive protection the law allows. *In re Hayes* (1997), 79 Ohio St.3d 46, 48.

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. (Comp. 49)

Despite the law and Smith's allegations, the trial court found that "plaintiff's assertion of hypothetical outcomes that do not relate even tangentially to plaintiff is not the type of rare exception contemplated by the Ohio Supreme Court to permit this court to find that plaintiff has standing as a matter of public policy to maintain this action." (Order at 4.) The trial court never addressed the DCA's public importance or its alleged encroachment on the judiciary. The court merely cited *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, *State ex rel. Ohio AFL-CIO v.*

*Ohio Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717, and *Ohio Roundtable v. Taft*, 119 Ohio Misc2d 49, 2002-Ohio-3669 in concluding that Smith needed to allege some additional individual relation to the DCA. (Order at 3-4)

Those cases reasoned no such thing. *Sheward* held that:

“Where the object of an action in mandamus and/or prohibition is to procure the enforcement or protection of a public right, the relator need not show any legal or special individual interest in the result, it being sufficient that the relator is an Ohio citizen and, as such, interested in the execution of the laws of this state.” Paragraph 1 of the Syllabus.

The Court found that:

“Since any injury, however small, is sufficient for purposes of private-action standing, there would be no objective basis upon which to disallow suits by attorneys or their organizations to challenge any number of statutory enactments...Accordingly, we find that the present action should not be allowed as a private action.

“However, there can be no doubt that the issues sought to be litigated in this case are of such a high order of public concern as to justify allowing this action as a public action.” *Id.* at 473-474.

The rest of the reasoning regarding standing focused on judicial power. *Id.*

In *Ohio AFL-CIO*, labor unions sought to invalidate a house bill allowing warrantless drug testing of injured workers. The unions claimed its members risked being potential subjects of the unconstitutional testing requirements. *Id.* at ¶8.

Standing did not depend on that pleading. The unions met the standing requirements of *Sheward* because the bill applied to virtually all Ohio workers and affected a core right (search and seizure). *Id.* at ¶12.

In *Ohio Roundtable*, a declaratory judgment regarding a lottery statute could proceed as a public action for a public policy organization, and as a private action for a gambling addict and a parent. The sole issue regarding public right standing, aside from citizenship, was the level of public importance involved:

“[T]his court finds that the action should be allowed to proceed as both a private and a public action. Some of the plaintiffs allege an injury sufficient to bring a private action....The plaintiffs also have standing to bring a ‘public action.’ Constitutional protections designed to promote education and prevent public corruption protect the very foundations of our republic. Both education and the absence of public corruption are foundation conditions for a healthy republic. Hence, the allegations presented in this case are matters of great public importance.”  
*Ohio Roundtable* at ¶44-45, 48.

Nowhere did these cases imply that a plaintiff/relator must allege outcomes related to himself. The determinative issue in each case was the high order of public concern the legislation presented. All of the plaintiffs had individual motivations for bringing the actions, but their own peculiar interests or "relations" were not part of the findings regarding public right standing.

The same was true in *Bowers v. Ohio State Dental Bd.* (2001), 142 Ohio App.3d 376 (10th Dist.), where this Court found a lack of standing. There, dentists sought to compel the dental board to adopt an administrative rule specifying which exams the board would accept for licensure. The dentists conceded they had no personal stake in the outcome. The court found that though the relief could affect many Ohioans tangentially, the duty sought to be compelled would not meaningfully benefit the public as a whole. Thus, the complaint raised no public duty. *Id.* at 381-382.

Similarly, the issue here is whether the relief will meaningfully benefit the public as a whole. And it will. The law intends to terminate parental rights without notice R.C. 2151.3524; OAC: 5101:2-42-95(A)(2). The DCA is available to all natural parents of an unharmed newborn. Thus, almost every citizen risks being harmed under this legislation, either as a newborn or as a parent.

Smith, a citizen, is one of those people at risk. It would be hyper-technical to require him to allege that he is sexually active, capable of producing children, or to

allege specific facts that the DCA, through anonymity, prevents him from discovering (such as his offspring having been deserted.) Also, that Smith cannot be sure he has *not* been victimized by the DCA's anonymity provisions, puts him within the parameters of the Act. Under the trial court's reasoning, no plaintiff can allege harm because, by definition, they do not know of the harm. We all have a beneficial interest in enjoining the enforcement of this law. Thus, Smith litigates for the benefit of himself and all other citizens.

**B. When the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties.**

*State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St3d 451, 471. The DCA's validity is of great public interest and importance because the law affects a fundamental right, involves state action, and applies arbitrarily, widely, and anonymously.

*The DCA affects a fundamental right*

The parent-child relationship is a bond that constitutes one of the most fundamental relationships upon which our society is based. *In re Adoption of Greer* (1994), 70 Ohio St.3d 293, 297. The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court. *Troxel v. Granville* (2000), 530 U.S. 57, 65. The importance holds even where blood relationships are strained. *Santosky v. Kramer* (1982), 455 U.S. 745, 752-754. Because termination of parental rights is the “death penalty” of family law, parents must be afforded every procedural and substantive protection the law allows. *In re Hayes* (1997), 79 Ohio St.3d 46, 48.

Due process itself is fundamental. The individual's right to a fair trial before a court of law is a fundamental right in a free society with a civilized system of justice *In re Contemnor Caron* (2000), 110 Ohio Misc.2d 58, 77. It is a basic tenet of an ordered society that to secure the right to a fair trial, it is essential to ensure public faith in the rule of law and the proper administration of justice *Id.* Timely remedy by due course of law is so fundamental as to be contained in our bill of rights. Ohio Const. Art. 1 § 16.

The DCA is a precursor to permanent custody. OAC: 5101:2-42-95(A)(2). Yet R.C. 2151.3524 and .3527 (the anonymity rights) pre-empt the court's ability to give parents notice at any custody stage and prevent parents from locating the child. This infringes substantially on a core right.

*The DCA applies widely, arbitrarily, and anonymously*

Under the DCA, any parent can, for any reason, surrender their unharmed newborn to the state anonymously. One need not be overwhelmed, unwed, homicidal, maliciously inclined, frantic, poor, young, inexperienced, raped, or anything else, to surrender their child under the Act. A parent can surrender solely for convenience, to preempt notice to the other parent, or to give the state insurmountable judicial advantages over the other parent that do not exist in traditional voluntary surrenders (e.g. negative best interest presumption).

The only restrictions are that the child be unharmed, three days old or less, and the person's biological child. But these restrictions are meaningless because they are unenforceable. (Comp. 34(b)). A person's biological relationship to an infant cannot be determined reliably by a third party upon sight. Nor can Hayes' agents determine a child's age to the preciseness required. Many child abuses can go undetected upon initial, cursory examination by a non-physician (e.g. drug-addiction, shaken baby). By



the time offenses are discovered, the parent's anonymity and exit rights have thwarted justice. Thus, the potential for using the deserted child act for wrongful purposes is great, with erroneous deprivation of rights not only predictable, but assured to a degree and quantity beyond what the DCA ostensibly allows. Anyone sexually active and capable of conceiving children stands at risk of being harmed by this law, as does every child born. In time, this will mean that every citizen is at risk--not just once, but twice--first as a newborn, then as a potential parent.

*Anonymity works to divest the court directly and broadly of judicial power.*

R.C. 2151.3524(A) and .3527 (A) (the anonymity rights) are the lynchpins to the DCA's threat. Anonymity renders courts impotent to do anything but rubber-stamp the custody motions. This represents an exercise of judicial power by the legislature A violation of the separation of powers doctrine alone may not warrant a public action. But the DCA far exceeds inadvertent encroachment. With anonymity, the General Assembly has enacted legislation designed solely to reach results that the U.S. and Ohio Supreme Courts have found to be unconstitutional in virtually every context.

It is well established that court agents must use reasonable diligence in locating deserting parents. *Tailford v. Bristline* (1917), 96 Ohio St. 581, 582. Failure to use reasonable diligence that would locate a party in a juvenile or adoption proceeding makes notice ineffective and any resulting judgment void. *Lewis v. Reed* (1927), 117 Ohio St. 152, 160-164. This applies even where a party misleads court agents about the parent's name and address. *Id.* at 156. (The adoption petitioner "willfully concealed the matter from the juvenile court to mislead the court and the probation officer in charge of the permanent custody proceedings, to prevent the juvenile court from serving a notice on the mother.") A lack of notice where names and addresses are known to the adoption

petitioner violates "the most rudimentary demands of due process of law." *Armstrong v. Manzo* (1965), 380 U.S 545, 550. The Ohio Legislature does not constitutionally have the power to deprive a biological parent of their parental rights without valid constructive notice. *In re Adoption of Knipper* (1986), 30 Ohio App.3d 214, (1st Dist.) at paragraph 1 of the syllabus, and at 216 citing *Armstrong*.

State statutes must protect even a parent's inchoate interest in assuming a responsible role in the future of his child. *Lehr v. Robertson* (1983), 463 U.S 248. States may require those parents to ensure their own right to notice of an adoption proceeding, provided the qualifications for notice are not beyond their control *Id.* at 264. Statutes that enable some alienated mothers arbitrarily to cut off the paternal rights of fathers denies equal protection of the laws. *Caban v Mohammed* (1979), 441 U.S. 380, 395. Adoption decrees entered with no evidence of waiver of rights or of notice violate the public policy of Ohio. *State ex rel Smith v. Smith* (1996), 75 Ohio St.3d 418, 421.

These principles apply to temporary custody proceedings. *Reynolds v. Ross Cty. Children's Services Agency* (1983), 5 Ohio St.3d 27, 28 (Because the father received no notice of the temporary and permanent custody hearings, a new temporary custody hearing, with notice to the father, was required); *In re Corey* (1945), 145 Ohio St. 413, 417-418 (The court's failure to give notice to the parents, and they not having voluntarily appeared, voided the temporary custody order); *Williams v. Williams* (1975), 44 Ohio St.2d 28, 31 (The lack of a service of a summons upon the father rendered the temporary custody order invalid.) *Williams* is particularly pertinent. There, the custodial mother obtained temporary custody ex parte even though no evidence of harm or danger to the children existed. The Court found a violation of Juv.R. 13:

"In relation to temporary custody orders in [Juv.R. 13] section (A), it is clear that section (E) directs that there shall be an opportunity for a hearing and notice of the hearing to the parties "wherever possible." (fn2) True, where the interest and welfare of the child require that action be taken immediately, the court may proceed without notice pursuant to section (D). However, in the instant case, the record does not reflect circumstances justifying such an ex parte proceeding. Therefore, the lack of service of a summons upon appellee, giving notice of appellant's complaint and an opportunity to be heard thereon, rendered the temporary custody order invalid(fn3)" *Id.* at 30-31.

These cases irrefutably establish a natural parent's right to notice and a hearing before any parental rights are terminated, and that without using reasonable diligence that would identify and locate parents, a court lacks jurisdiction to make a temporary or permanent custody order. The DCA intentionally nullifies this.

The General Assembly was well aware that effective notice requires knowing a parent's name and address. Juv.R. 16(A). Under the DCA, the surrendering parent is the sole source of that information. Yet R.C. 2151.3524 and .3527 let the parent withhold it. This naturally keeps information concealed from the court, puts the qualifications for notice beyond the control of the non-surrendering parents, and lets alienated mothers arbitrarily cut off the parental rights of fathers, particularly those innocently ignorant of the pregnancy. Adoption decrees are thus entered with no evidence of the non-surrendering parent having waived rights or notice, while temporary and permanent custody rights are adjudicated ex parte despite the child being surrendered voluntarily, safely, and unharmed.

Consequently, the General Assembly could not have enacted R.C. 2151.3524 and .3527 without knowing that it was re-enacting the very procedures and results invalidated in the above-cited cases. The DCA therefore goes beyond questionable law, and is instead a direct attack on the judiciary. See *Sheward* at 477-478 and 506.

The DCA is designed to evade judicial review from the outset

The parents most vulnerable to the DCA are fathers who do not know they have begotten children. Anonymity, by its operation, prevents these fathers from knowing that their interest is threatened. Many situations exist in which a father may justifiably be away from, or ignorant of, his newborn. These might include military service, hospitalization, temporary work assignment in another state or country, or simply the mother not informing the father and separating from him. This does not imply abandonment. Rather, abandonment requires willful failure to care or support. *In re Schoeppner* (1976), 46 Ohio St.2d 21. Thus, all fathers, known or unknown, are entitled to notice of a proceeding affecting their parental rights. With anonymous surrender however, no one can even tell the father of the child's existence or status.

Ohio recognizes an unwed man's protectible interest in pursuing custody of a child he finds out about only after the birth. See R.C. 3107.061 and 3107.07(B)(1). Sexual intercourse itself puts a man on constructive notice of a possible birth and adoption petition. *Id.* But the anonymity provided under R.C.21513524 and .3527 forecloses the notice procedure by preventing those fathers from discovering or investigating potential births in the first place. In voluntary surrenders, the putative father registry helps this. But the DCA treats the infant as "neglected," rendering putative father registration inapplicable. R.C. 3107 064(A)(5). The potential for wrongful use of the DCA by those wishing to avoid notice to the fathers becomes obvious. The DCA encourages mothers to choose desertion over voluntary surrender solely because the former precludes notice through anonymity while the latter does not.

The DCA even precludes habeas relief Even if the non-surrendering parent learns of the facts, they must still submit to, and pay for, DNA testing and rebut the

presumption that the child's interests oppose reunification. That is not a realistic remedy, but a denial of access to the courts and an attempt to shield the legislation from judicial review. In sum, the DCA eliminates adversity permanently by giving the surrendering parent a veto over notice originally.

Hayes advertises this. After telling parents they need not provide any information, he promises them that: "The professional staff person who accepts the baby will contact the county children's services agency; and the baby will be placed in an adoptive home." <http://jfs.ohio.gov/safehavens>. Hayes is confident the adoption will not be contested or disrupted. He is correct. That is why Smith must be here now.

The public will soon see anonymous desertion as a full-fledged alternative to traditional voluntary surrender regarding newborns. We must not let legal child desertion steamroll. Because of its widespread potential, the seriousness of the rights affected, and its evasion of judicial review, the DCA's validity must be determined now.

### **CONCLUSION**

The DCA enacts procedures and results that the courts have long held to be unconstitutional and civilly harmful. The DCA intentionally infringes on all citizens' ability to grasp their fundamental right to notice of an adoption or custody proceeding. Anonymity shields the DCA from judicial review and deprives non-surrendering parents of a practical remedy. This violates the separation of powers doctrine directly. That the Act boldly requires DNA testing on speculation and tells the Courts what to presume regarding children's best interests, under a factual scenario mimicking that of traditional dependency, neglect, or voluntary surrender proceedings, makes the divestiture broad. The DCA involves action by state agents and may be used arbitrarily by any new parent. Thus, for the public's protection, the DCA's validity demands early

resolution.

For the foregoing reasons, Smith asks this Court to reverse the trial court's judgment and remand this case for determination on the merits.

Respectfully submitted,

---

Erik L. Smith, Appellant, Pro Se  
518 E. Town St., #308  
Columbus, OH 43215  
(614) 221-1827

**CERTIFICATE OF SERVICE**

I certify that a true copy of the foregoing Brief of Appellant was sent via regular U. S. mail to Elise Porter, Assistant Attorney General, Constitutional Offices Section, 30 East Broad Street, 17th Floor, Columbus, OH 43215-3428, on January 10, 2005

---

Erik L. Smith  
Appellant, Pro Se