

MEMORANDUM IN SUPPORT

BACKGROUND

On June 3, 2004, plaintiff, asserting public right standing, filed an Amended Complaint asking the Court to declare R. C. 2151.3515 - .3530 (“deserted child act”) unconstitutional and to enjoin defendant from enforcing the act. Plaintiff alleged violations of the doctrine of separation of powers, due process, equal protection, pre-emption, and illegal contract. Plaintiff alleged that the issues sought to be litigated were of great importance to the public. (Complaint 1, 50 hereafter “Comp.”)

STANDARD OF REVIEW

The court views all of the allegations in the complaint as true. Butler v. Cuyahoga Cty. Dept. of Human Serv. (2001), 92 Ohio St.3d 354, 374. The Court grants the motion to dismiss only where it appears beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. O'Brien v. Univ. Community Tenants Union, Inc. (1975), 42 Ohio St.2d 242, 245. The plaintiff must be afforded all reasonable inferences possibly derived from the allegations in the complaint. Desenco, Inc. v. Akron (1999), 84 Ohio St.3d 535, 538.

LAW AND ARGUMENT

How one analyzes the validity of the deserted child act depends on whether the parent-child separation therein represents a unilateral act by the parent or a surrender agreement between the parent and the state. The deserted child act is unconstitutional regardless, as legal scholars have opined. *See Dayna R. Cooper, Fathers are Parents Too: Challenging Safe Haven Laws with Procedural Due Process.* 31 Hofstra Law Rev. 877. Spring 2003. But seeing the deserted child act for what it is--contractual relinquishment disguised as an emergency/neglect proceeding--shows its invalidity and potential for harm more clearly. Thus, plaintiff addresses

part B of defendant's dismissal motion first.

A. Plaintiff States Valid Constitutional Claims

Defendant claims plaintiff must assert that Hays, by implementing and enforcing the law, caused a loss of parental rights. (Dismiss Motion, pg. 5) This is incorrect. A statute that violates the doctrine of separation of powers is unconstitutional State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451, syllabus par. 2. That shown, the Court may issue injunctive relief to prevent resulting harm. R.C. 2721.02(A); 2127.09. But denial of parental rights resulting from the law's enforcement is inferred from plaintiff's Complaint, particularly from the last sentence in paragraph 4. (See Comp. 4-8) Besides, Movant admits harm is occurring. (Dismiss Motion, pg. 5-6). He simply disagrees with plaintiff about its source, blaming it solely on the parent. (Id) Plaintiff's Complaint indicates that defendant's enforcement of the deserted child act is threatening the public interest and depriving involved parents of their right to receive notice of proceedings affecting parental rights (Comp. 47, 49)

Furthermore, a valid public action claim requires no specific injury, only that an important public interest needs vindicating, as it does here. Ohio Roundtable v. Taft, 119 Ohio Misc.2d 49, 2002-Ohio-3669 at Par. 41-43, citing Sheward at 503 Plaintiff stated a public action. (Comp. 1, 50) Because defendant is charged with enforcing and implementing the deserted child act, Hayes is the proper recipient of the injunctions.

The Deserted Child Act as Contractual Relinquishment

The deserted child act creates a contract because it represents a voluntary agreement between the surrendering parent and a public placing agency to surrender the child into the temporary or permanent custody of that agency.

“A contract is an agreement, upon sufficient consideration, between two or more persons to do or not to do a particular thing.” Lawler v. Burt (1857), 7 Ohio St. 340, 350. A contract features an offer by one side, acceptance by the other, and a meeting of the minds as to the essential terms. Noroski v. Fallet (1982), 2 Ohio St.3d 77, citing 17 Ohio Jurisprudence 3d (1980), Contracts 445-446, Section 17. A contract can be any description of agreement or obligation, verbal or written, whereby one party becomes bound to another to perform or omit a certain act. Terex Corp. v. Grim Welding Co. (1989), 58 Ohio App.3d 80, 82.

Voluntary child surrenders under the adoption code are contractual because they are an agreed custody exchange. See In re Miller (1980), 61 Ohio St.2d 184, 189; Kozak v. Lutheran Children's Aid Society (1955), 164 Ohio St. 335, 342; R.C. 5103.15. Those agreements do not represent judicial commitment requiring a dispositional order. Miller (1980) syllabus at 1. Instead, a parent’s voluntary surrender of the child constitutes an offer to the agency See Angle v. Children's Services Div. (1980), 63 Ohio St.2d 227, syllabus at 3

The deserted child describes such a contract. The persons designated in R.C. 2151.3516 are authorized recipients of the voluntary surrender. The parent, in response to the statutes, voluntarily offers the unharmed infant to the state-authorized person. The transaction is complete when the agent accepts the child and, in return, the surrendering parent is promised anonymity, criminal immunity, and release from all parental responsibility. Both parties understand that the chain of possession will lead to Children’s Services, and to permanent custody. R.C. 2151.3518. The authorized employee can revoke the anonymity promise and enforce the arrest provisions of R.C. 2151.3524(B) only if the child appears to be abused or neglected. R.C. 2151.3524(B). Obviously then, the deserted child is not neglected, dependent, or abandoned, but voluntarily surrendered. The surrendering parent has simply offered to relinquish rights and responsibilities

according to a procedure offered and advertised by the state. The dispositional hearing is misnomer; for the Court merely decides, upon the state agent's word, whether a surrender occurred. The deserted child act clearly creates a contract.

The contract is illegal because, through anonymity, it irrationally allows for the denial of procedures that would give effect to the rights of both parents, as required in adoption and juvenile proceedings. Williams v. Williams (1975), 44 Ohio St.2d 28, 31 (“[T]he 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.”) The true breadth of the law's harm is revealed. The deserted child act is a wild card for circumventing the entire adoption code, a good portion of the juvenile code, the juvenile rules, and applicable federal laws like ASFA and ICWA. Realizing this, the statutory scheme's validity crumbles exactly as plaintiff's complaint alleges, starting with the violation of the separation of powers doctrine.

Defendant argues that the deserted child act does not violate the separation of powers or procedural due process because the relinquishing parent alone causes the separation, thereby properly invoking the ex parte provisions of Juv.R. 13. (Dismiss motion at 5-6) The argument lacks merit. Possible severance of the parent-child relationship through a custody change must always be guarded by procedures that give effect to the rights of both parties, including notice to both parents. Williams v. Williams (1975), 44 Ohio St.2d 28, 29. “Give effect” means procedures aimed to *realize* the rights of interested parties in line with the circumstances. It does not mean granting one party permission to invoke less effective procedural rules. See Williams at 31 (the record did not reflect circumstances justifying ex parte proceedings.) This rule applies to all custody proceedings, emergency, temporary, and permanent. See Williams at 29-31 Constructive notice too is flawed where a petitioner has failed to use reasonable diligence

in trying to discover a biological parent's address. In re Adoption of Knipper (1986), 30 Ohio App.3d 214 syllabus at 2. Minimal efforts do not constitute reasonable diligence; rather, it is demonstrated by "such diligence, care, or attention as might be expected from a man of ordinary prudence and activity" Sizemore v. Smith (1983), 6 Ohio St.3d 330, 332. Laws that allow reasonable diligence to be circumvented are unconstitutional. In re Adoption of Knipper.

Logic dictates that reasonable diligence requires getting at least the name and address of the relinquishing parent. Putative father registry searches, for example, require knowing at least the mother's name so as to cross-reference it with the father's name. R.C. 3107.063. Giving a parent permission to remain non-informative is therefore tantamount to refusing to exercise reasonable diligence. Likewise, anonymity is tantamount to letting a relinquishing parent veto notice to the non-relinquishing parent. This violates the juvenile rules and denies procedural due process. (Comp. 23, 28) Because anonymity does not directly advance child safety, the deserted child act also violates the right to substantive due process (Comp. 34)

Defendant argues that the deserted child act provides for equal protection because the law treats both parents the same after the relinquishment. (Dismiss motion at 7) But the deserted child act does *not* treat both parents the same. The surrendering parent is the *only* parent with notice of the agreement, a provision of which is hostile to the non-surrendering parent. Alternatively, the surrendering parent's waiver of notice of the juvenile proceeding wrongly imputes waiver by the other parent. Thus, plaintiff clearly states valid constitutional claims.

B. Plaintiff has Standing under the Public Right Doctrine Because the Issues Sought to be Litigated are of Great Interest and Importance to the Public

To have standing to attack the constitutionality of a legislative enactment, the private litigant must generally show a concrete injury. Ohio Contractors Assn. v. Bicking (1994), 71 Ohio St.3d 318, 320. However, 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 St.3d 451, 471. Courts entertain such actions where the alleged wrong affects the citizenry as a whole, involves issues of great importance and interest to the public at large, and the public injury by its refusal would be serious. See Sheward, 86 Ohio St.3d at 471 and 503. Courts find these criteria satisfied where the particular law has widespread applicability while also affecting a compelling interest or divesting the courts of judicial power.

For example, in Sheward, relators had standing to block a bill enacting statutes of repose, collateral benefit deductions from jury awards, and damage caps on tort claim awards. Because the legislature had re-enacted law in direct conflict with civil rules, the bill was fundamentally contrary to the doctrine of separation of powers Id. at 479. Because the bill also affected the fundamental right to a jury trial and applied to torts generally, the relators could pursue mandamus relief *despite no injury having occurred*. Sheward at 484-485.

In Ohio Roundtable v. Taft, 119 Ohio Misc.2d 49, 2002-Ohio-3669, plaintiffs had public right standing to seek a declaratory judgment regarding a statute that allegedly let state lottery proceeds be used for non-educational purposes. The issues were of great public importance because, “[c]onstitutional protections designed to promote education and prevent public corruption protect the very foundations of our republic.” Id. at Par. 48.

State ex. rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp., 97 Ohio St.3d 504, 2002-Ohio-6717, concerned a worker's compensation statute requiring blood, breath, or urine testing after a work injury. Under an amendment to the statute, employees refusing the test were rebuttably presumed intoxicated when injured, which could affect benefits. Although the relators had alleged no specific injury, they could pursue mandamus relief because the amendment had sweeping applicability and concerned the fundamental right to be free from unreasonable searches and seizures Id. at Par. 12.

In Grendell v. Ohio Environmental Protection Agency (2001), 146 Ohio App.3d 1 (9th Dist.), the Court analyzed the state's contract for conducting auto emissions tests in its E-check program pursuant to a statute. The statute, and contract created under it, let the director credit inspection fees to the motor vehicle and maintenance fund, allegedly violating the joint venture clause of the Ohio Constitution. The trial court had considered these to be issues of a high enough order of public concern to justify a public action. Id. at 14-15. This held even though the complaint was a request for declaratory judgment and presented a purely legal question. Id. at 5.

Where claims have become moot, parties may establish standing either by invoking the public right doctrine or by showing that the issues are capable of repetition, but evade review. For example, in Wright v. Ohio Bur. of Motor Vehicles (1994), 67 Ohio Misc.2d 29, the Court analyzed a statute that required automatic driver license suspension of Ohio citizens convicted of a DUI offense out of state, but let instate convicts be eligible for occupational driving privileges. The plaintiff was convicted in Indiana and received notice from the BMV of a six-month suspension. The suspension ended by the time the plaintiff exhausted administrative appeals. The Municipal Court ruled that plaintiff had standing to bring his request for declaratory judgment

because the statute “had the potential to affect every person with an Ohio driver’s license.” Id. at 35. The defendant also had standing because “The situation here will be repeated every time an Ohio licensee is convicted of an out-of-state DUI.” Id. at 36.

Also important in establishing public right standing is whether the law is prone to wrongful use. For example, in State, ex rel. Ohio Motorists Assn., v. Masten (1982), 8 Ohio App.3d 123, a village ordinance allowed a traffic control device to be erected in a location which did not comply with statewide standard. Although no injury had occurred, the relators had standing because, as citizens, they were manifestly interested in the uniform execution of traffic laws and the ordinance could be used solely to entrap motorists and extract fines. Id. at 127, 129.

Public interest cases are judged case-by-case. But these precedents show that when determining the “seriousness of injury” and “importance to the public” aspects of public right standing, Courts focus on whether the issues involve a fundamental or compelling interest, or violate the separation of powers. Courts then assess the effect on the citizenry by determining the law’s range of applicability, to which the potential for wrongful use speaks strongly Masten. Then, in mootness cases, Courts consider the public right doctrine and, alternatively, whether the law can continuously evade review. Wright.

The deserted child act affects a fundamental interest. The right to the care, custody, and management of one’s children is a fundamental liberty interest, 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, quoting In re Smith (1991), 77 Ohio App.3d 1, 16.

The deserted child act also divests the Courts of judicial power as plaintiff established earlier Plaintiff can add however, that legislatures divest Courts of judicial power when, through their enactments, they tell the courts how to address matters normally reserved for the courts to determine. Sheward; Van Dusen v. Van Dusen, 151 Ohio App.3d 494, 2003-Ohio-350 (10th Dist.). (Exhibit “A”) This occurs where the legislature passes statutes directly opposing Supreme Court holdings or Court rules. See Sheward; Van Dusen at par. 15. Moreover, a disregard for the traditional powers of the other branches of government is especially egregious in the parenting context. Van Dusen at par. 16. “The courts are in the best position to look out for the best interests of a child.” Id. at par. 16-17.

As between a parent and a non-parent, a parent may be denied custody only if the evidence demonstrates abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parent is otherwise unsuitable. In re Perales (1977), 52 Ohio St.2d 89. The qualifications for notice must not be beyond the control of interested parents. Lehr v. Robertson (1983), 463 U.S. 248, 264. A statute that allows a parental rights termination decree to stand, despite a lack of reasonable diligence exercised to provide the parent notice, denies due process and violates the separation of powers. In re Adoption of Knipper (1986), 30 Ohio App.3d 214, 216 (1st Dist.), applying Armstrong v. Manzo (1965), 380 U.S. 545 (total absence of notice to a divorced father about adoption proceedings that would terminate parental rights denied due process and rendered the adoption decree constitutionally invalid).

The deserted child act, particularly R.C. 2151.3520 and .3521, opposes Perales by proceeding to a best interest hearing without determining whether the non-surrendering parent abandoned or contractually relinquished the child, or was unsuitable. The deserted child act allows for a total absence of notice, directly opposing Armstrong and Knipper. Thus, the act

likely excludes responsible fathers, directly opposing Lehr. The deserted child act also invades privacy and restricts access to the Court by requiring DNA testing before one knows enough to bring a habeas corpus petition. (R.C. 2151.3528) By making DNA testing a prerequisite for accessing a court and pursuing a remedy (and not simply for establishing paternity), the deserted child act precludes habeas relief. These infringements are made possible initially by the arbitrary right to anonymity under R.C. 2151.3524 and .3527. The deserted child act violates the separation of powers by eliminating the need for agencies to use reasonable diligence in locating non-relinquishing parents and by sidestepping Supreme Court precedents and Court rules.

The Deserted Child Act Affects the Citizenry at Large

The deserted child act affects the citizenry at large because it evades judicial review from the outset while being available to virtually anyone.

The deserted child act lets *any* person, married or unmarried, for *any* reason, free from intrusion and pursuit, surrender their unharmed, biological, three-day-old or younger child with designated persons *anonymously*. (Alleged in complaint at par. 4; Dismiss Motion at 2) A parent need not be overwhelmed, homicidal, maliciously inclined, frantic, poor, young, inexperienced, raped, or anything else, to surrender the child *secretly*. A parent can surrender solely to circumvent formal procedure, to preempt notice to the other parent, or give the state other insurmountable judicial advantages over the other parent that would not exist in traditional voluntary surrenders (e.g. negative best interest presumption under R.C. 2151.3521).

The only restrictions on utilizing the deserted child act are that the child be unharmed, three days old or less, and the person's biological child. But these restrictions are smokescreens 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 the employees designated in

R. C. 2151.3516 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 the offenses are discovered, the parent's anonymity and exit rights have thwarted justice. See R.C. 2151.3524(A). 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 deserted child act ostensibly allows. In sum, 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 every citizen being at risk--not just once, but twice--first as a newborn, then as a potential parent. Plaintiff realizes most Ohioans will not surrender their children anonymously. But that does not justify enacting an at-large lottery for the termination of parental rights.

The Deserted Child Act Is Designed To Evade Judicial Review From the Outset

The parents most vulnerable to being erroneously deprived of custody and parental rights are those fathers who do not know they have begotten children. Anonymity, by its very 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* or *unjustified* failure to care or support. In re Schoeppner (1976), 46 Ohio St.2d 21. For this reason all presumed, acknowledged, and registered putative fathers, known or unknown, are entitled to notice of, and a hearing in, an adoption or juvenile proceeding. See Lehr v. Robertson (1983), 463 U.S. 248. With anonymous relinquishment however, no one is even able to 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). Sex itself puts a man on constructive notice of a possible birth and adoption petition. Id. But the anonymity provided under R.C.2151.3524 and .3527 forecloses the notice procedure by preventing such fathers from discovering or investigating potential births in the first place. In adoption surrenders, the putative father registry cures this. See R.C. 3107.062. But under the deserted child act, the infant is judicially committed under chapter 2151, not voluntarily surrendered under R.C. 5103.15, thus rendering putative father registration inapplicable. RC. 3107.064(A)(5). The potential for wrongful use of the deserted child act by those wishing to avoid notice to the fathers becomes obvious. The deserted child act encourages mothers to choose desertion over voluntary surrender solely because the former precludes notice through anonymity while the latter does not.

The Supreme Court has recognized that the chance to avoid a father can wrongly influence mothers to surrender their children. Marich v. Knox Cty. Dept. of Human Serv. (1989), 45 Ohio St.3d 163. In Marich, a social worker told the mother that permanent surrender would avoid the father's involvement, which the mother had repeatedly inquired about. Id. at 163-164. Later, the social worker's statements were strong evidence of undue influence having been used in securing the mother's permanent surrender agreement. Id. at 166-167.

The deserted child act exceeds that. Together, R.C. 2151.3519, .3524, and .3527 tell mothers *ahead of time* that fathers can be left out. Thus, defendant's now vigorous promotion of the desertion of child act makes the safe haven "option" all the more appealing and acceptable to those mothers who want to assure a father's absence. (Comp. 6) Those mothers are likely the ones to whom the deserted child act will primarily appeal. All fathers, known, unknown, and

unknowing, are entitled to due process in custody or adoption proceedings. The deserted child act denies that due process by refusing to apply strict notice requirements to the very class of parents who need them most. Thus, as in certain mootness cases, the situation will be repeated continuously, yet will evade review. Only here, the specially aggrieved individual never receives notice at all. Because the deserted child act allows the harm to continue unchecked by design, the Court should review the Act's validity now.

The only theoretical justification for state-sanctioned anonymous child surrender is that the anonymity serves an interest so compelling that erroneous deprivations of parental rights are justified. The state's interest is promoting the health and welfare of children. (Dismiss Motion at 6) Plaintiff appreciates and shares that interest. However, because R.C. 2151.3524 is at least one step removed from child safety specifically, it does not directly advance the government's goal (Comp. 28(j)). This defeats a state's rationale for infringing on a competing, compelling interest. See State v. Hochhausler (1996), 76 Ohio St.3d 455, 467. In addition, less infringing mechanisms for achieving the child's safety exist, such as traditional permanent and temporary surrenders, which already offer confidentiality. (Comp. 28(h), 34(a), 37(a)) That the relinquishing parent enjoys criminal immunity refutes the rationality of R.C. 2151.3524 and .3527 entirely. Further argument on rationality speaks to the merits and should be reserved for a summary judgment motion. For now, the public simply should not have to live under the threat of the deserted child act, especially when that threat was judicially denounced and removed long ago by numerous Court precedents and the juvenile rules.

Standing should be conferred on plaintiff in any case because the deserted child act is cruel to every child and non-surrendering parent it afflicts. To wait until one suffers the horror of their newborn child legally disappearing, then having to find the child through their own

efforts, to challenge a statute that puts a negative presumption against the parent from the outset, after submitting to and paying for a DNA test, despite legally presumed or acknowledged parenthood, is gross irresponsibility. Likewise, we should not have to wait twenty years for the children of these “deserters” to number into the hundreds or more and, angry at being discarded with no identity, form groups demanding answers from the government, only to be turned away with no recourse. All Ohio citizens need to know, simply as they go about their daily lives, that the state will not contract secretly with the other parent to eliminate their right to notice of a proceeding threatening their parental rights. That fundamental security is due to all persons before they even beget children. The legislature obviously thought a compelling interest justified infringing broadly on that fundamental security. Plaintiff asks that, in the interest of the public as a whole, we determine the validity of that.

CONCLUSION

Plaintiff’s Complaint alleged that the deserted child act has harmed, and will harm, children and parents by denying them their constitutional rights. Plaintiff alleged that defendant intends to promote the deserted child act vigorously, and that the issues to be litigated are of great interest and importance to the public. Plaintiff has shown the validity of his allegations here. Thus, the requirements of the public right doctrine, and for stating valid constitutional claims, are met. Accordingly, the Court should deny defendant’s motion to dismiss. Alternatively, if plaintiff needs to specify matters in his Complaint, he asks the Court to let him amend.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Plaintiff's Memorandum Contra Motion to Dismiss and Memorandum in Support 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 this _____ day of June, 2004.

Erik L. Smith
Plaintiff, Pro Se