

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

The State of Ohio ex rel. Charles R. Evans, :
Relator, :
v. : No. 09AP-390
The Honorable Judge Thomas Louden : (REGULAR CALENDAR)
and The Franklin County Court of Common :
Pleas, Domestic Relations Division, :
Respondents. :

D E C I S I O N

Rendered on September 22, 2009

Charles R. Evans, pro se.

Ron O'Brien, Prosecuting Attorney, and Paul Thies, for respondents.

IN PROHIBITION
ON MOTION FOR SUMMARY JUDGMENT

TYACK, J.

{¶1} Charles R. Evans filed this action in prohibition seeking a writ to bar Judge Thomas Louden from ruling on the constitutionality of R.C. 3109.04, 3109.043, and Civ.R. 75(N).

{¶2} In accord with Loc.R. 11, the case was referred to a magistrate to conduct appropriate proceedings. Counsel for Judge Loudon filed a motion seeking summary judgment on behalf of the judge. Charles R. Evans filed a memorandum in response.

{¶3} The magistrate issued a magistrate's decision containing detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we grant the motion for summary judgment.

{¶4} No objections to the magistrate's decision have been filed. The case is now before the court for review.

{¶5} No error of law or fact is present on the face of the magistrate's decision. We, therefore, adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we grant summary judgment on behalf of Judge Loudon and refuse the request for a writ of prohibition.

*Writ of prohibition denied;
summary judgment granted.*

SADLER and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel. Charles R. Evans, :

Relator, :

v. :

No. 09AP-390

The Honorable Judge Thomas Louden :
and The Franklin County Court of Common :
Pleas, Domestic Relations Division, :

(REGULAR CALENDAR)

Respondents. :

MAGISTRATE'S DECISION

Rendered on May 28, 2009

Charles R. Evans, pro se.

*Ron O'Brien, Prosecuting Attorney, and Paul Thies, for
respondents.*

IN PROHIBITION
ON MOTION FOR SUMMARY JUDGMENT

{¶6} Relator, Charles R. Evans, has filed this original action requesting that this court issue a writ of prohibition to prevent Judge Thomas Louden from ruling on the constitutionality of R.C. 3109.04, 3109.043, and Civ.R. 75(N) (hereinafter "provisions"). Relator asserts that it is improper for respondent to issue a ruling because relator has collaterally attacked the constitutionality of the provisions at issue in a separate action.

Findings of Fact:

{¶7} 1. On April 17, 2009, relator filed the instant complaint seeking a writ of prohibition.

{¶8} 2. Relator indicates that he filed a complaint for declaratory judgment challenging the provisions as unconstitutional.

{¶9} 3. Relator also acknowledges that, on January 12, 2009, the trial court rendered a decision and entry granting a motion to dismiss filed by the State of Ohio and dismissed relator's declaratory judgment complaint. See *Evans v. State of Ohio*, Franklin Co. C.P. No. 08CVH-11-15756.

{¶10} 4. Relator also acknowledges that he has appealed from the decision and entry granting the state's motion to dismiss his declaratory judgment action and that appeal is now pending before this court. *Evans v. State of Ohio*, 10th Dist. No. 09AP-135 (appeal filed February 9, 2009).

{¶11} 5. Relator contends that, if respondent proceeds in his underlying divorce action and makes any determinations with regard to the custody of his children, respondent will be improperly exercising its jurisdiction since, by necessity, the court will have to rule on the constitutionality of the previously cited provisions.

{¶12} 6. In the motion for summary judgment, the assistant prosecuting attorney has attached a certified copy of the April 21, 2009 judgment entry of respondent demonstrating that relator has withdrawn his pending motions including his motion asking respondent to address the constitutionality of the previously cited provisions.

Further, pursuant to that judgment entry, hearing dates were established for concluding the underlying domestic relations and custody matters.

{¶13} 7. Respondent filed its motion for summary judgment on May 1, 2009, and relator filed his memorandum contra on May 5, 2009.

{¶14} 8. The magistrate issued an order setting the motion for summary judgment for submission on May 26, 2009.

Conclusions of Law:

{¶15} For the reasons that follow, it is this magistrate's conclusion that this court should grant respondent's motion for summary judgment.

{¶16} A motion for summary judgment requires the moving party to set forth the legal and factual basis supporting the motion. To do so, the moving party must identify portions of the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. Accordingly, any party moving for summary judgment must satisfy a three-prong inquiry showing: (1) that there is no genuine issue as to any material facts; (2) that the parties are entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, which conclusion is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶17} A writ of prohibition is an extraordinary judicial writ, the purpose of which is to restrain inferior courts and tribunals from exceeding their jurisdiction. *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70. A writ of prohibition is customarily granted with caution and restraint, and is issued only in cases of necessity arising from

the inadequacy of other remedies. *Id.* In order to be entitled to a writ of prohibition, relator must establish that: (1) respondent is about to exercise judicial or quasi-judicial powers; (2) the exercise of the power is unauthorized by law; and (3) the denial of the writ will cause injury for which no other adequate remedy in the ordinary course of law exists. *State ex rel. Henry v. McMonagle* (2000), 87 Ohio St.3d 543.

{¶18} In this prohibition action, relator appears to argue that respondent cannot take any further action on his pending domestic relations case, including hearing and determining any matters with regards to the custody of his children, because the statutes and the civil rule which provide for custody determinations, the provisions, are unconstitutional. However, as indicated in the findings of fact, relator has withdrawn his underlying motion asserting that those provisions are unconstitutional. As such, respondent is not about to issue a decision regarding the constitutionality of the provisions and relator cannot establish that respondent is about to exercise judicial powers which are unauthorized by law.

{¶19} Further, relator is incorrect when he argues that respondent would not have jurisdiction to render declaratory judgment regarding the provisions in the event respondent was asked to do so and, relator would have a right to appeal from that judgment just as for any other judgment pursuant to R.C. 2721.08. As such, relator can challenge respondent's determination with regard to his underlying domestic relations case, the custody matter involving his children, and any issues relator has regarding the constitutionality of the provisions after respondent issues a judgment in the underlying matter. As such, on the one hand, respondent is not about to rule on a motion

challenging the constitutionality of the provisions because relator has withdrawn his motion. On the other hand, respondent has jurisdiction to make that determination in the underlying action. As such, relator is not entitled to a writ of prohibition and summary judgment should be granted in favor of respondent.

Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).