

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel.
CHANCE CATUDAL,

Relator,

v.

JUDGE KIM A. BROWNE

And

FRANKLIN COUNTY COMMON
PLEAS COURT, DOMESTIC
RELATIONS DIVISION,

Respondents.

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Case No. 2012-1795

Original Action for Issuance of Writ
of Mandamus

RESPONDENTS' MOTION TO DISMISS

Chance Catudal, *Pro Se*
2783 Martin Road #353
Chillicothe, Ohio 45601

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Counsel for Respondents

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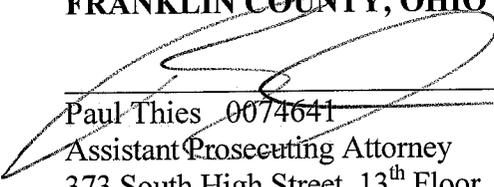
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RESPONDENT'S MOTION TO DISMISS PURSUANT TO CIV. R. 12(B)6

Now comes Respondents, the Honorable Judge Kim Browne and the Franklin County Court of Common Pleas, by and through counsel, and respectfully move this Court to dismiss this claim pursuant to Civ. R. 12(B)(6). This motion is made upon the ground that Relator has not stated a claim upon which relief can be granted. Respondents' positions are more fully articulated in the attached memorandum in support which is incorporated here by reference.

Respectfully submitted,

**RON O'BRIEN
PROSECUTING ATTORNEY
FRANKLIN COUNTY, OHIO**


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Counsel for Respondents

MEMORANDUM IN SUPPORT

I. Facts

Relator submitted a “Motion Requesting Emergency Ex Parte Order” on July 2, 2012. Plaintiff’s motion sought relief in the form of, “a Temporary Emergency Ex Parte Order designating him as both Custodial and Residential Parent of Haley A. Catudal.” A copy of that motion is attached for the Court’s convenience as Exhibit A, as none of the Exhibits (A through Q) are labeled as attached to Relator’s Complaint.

A hearing was held on Relator’s motion on July 9, 2012. Pet. p. 3, ln. 33. Relator erroneously states that the matter was continued until July 16, 2012, (Pet. p. 3, ln. 34), and he fails to mention that Magistrate Sieloff entered an Order on the date of the hearing which directs the parties to abide by a phone call schedule. “Magistrate’s Order,” July 9, 2012, Exhibit B. Relator also states that a hearing was held on July 16, 2012. Relator now seeks issuance of a Writ of Mandamus “requiring that Respondents conduct a hearing of the Ex Parte Motion that he filed on July 2, 2012.” Pet. p. 7, ln. 38.

II. Standard of Review

In considering a motion to dismiss for failure to state a claim, the Court must construe all material allegations in the Complaint and all inferences that may be reasonably drawn there from in favor of the nonmoving party. *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666. In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that plaintiff can prove no set of facts warranting relief. *State ex rel. Jennings v. Nurre* (1995), 72 Ohio St.3d 596; *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143.

III. Argument

A. Franklin County Court of Common Pleas is not *sui juris*.

Relator has named as Respondent, “Franklin County Common Pleas Court, Domestic Relations Division,” a non-entity which cannot provide the relief requested. A court is a place where a proper officer or officers administer justice through use of judicial power. *Malone v. Court of Common Pleas* (1975), 45 Ohio St.2d 245 Citing *Todd v. United States* (1895), 158 U.S. 278, 284; *State ex rel. Cleveland Municipal Court v. Cleveland City Council* (1973), 34 Ohio St. 2d 120, 121. Absent express statutory authority, a court can neither sue nor be sued in its own right. *State ex rel. Cleveland Municipal Court v. Cleveland City Council* (1973), 34 Ohio St.2d 120, 296 N.E.2d 544. Relator does not name a “proper officer or officers” instead naming the entire “Franklin County Common Pleas Court”. Thus, the action against Respondent “Franklin County Common Pleas Court” should be dismissed.

B. Relator has already been provided the relief requested.

Relator’s Action in Mandamus seeks relief in the form of a hearing. Pet. p. 7, ln. 38. Relator had a hearing on July 9, 2012, and another hearing on July 16, 2012. Relator seems to have drawn the conclusion that because he was not granted temporary custody, the matter must not have been heard. Consequently, Relator’s petition sounds as if it were an appeal. “[A]lthough a writ of mandamus can lie to compel a judge to render a judgment on a matter, it cannot be used to control the discretion of a judge and dictate a specific ruling upon a pending matter.” *Penko v. Mitrovich*, 2004-Ohio-6326. Simply because Relator did not obtain the ruling he sought does not mean that he was not afforded a fair and impartial hearing on the matter.

Relator's two hearings on the underlying motion preclude the issuance of a Writ of Mandamus in this instance, because the issue is moot. "Mandamus does not lie to compel an act that has already been performed." *State ex rel. Scruggs v. Sadler*, 2004-Ohio-2054, 102 Ohio St. 3d 160, 807 N.E.2d 357, 358 (citing *State ex rel. Chapnick v. E. Cleveland City School Dist. Bd. of Edn.* (2001), 93 Ohio St.3d 449, 451, 755 N.E.2d 883). Since Relator specifically requests relief in the form of a hearing, this Action in Mandamus should be dismissed because two hearings have already been performed.

C. Issuance of Mandamus is not proper in this case.

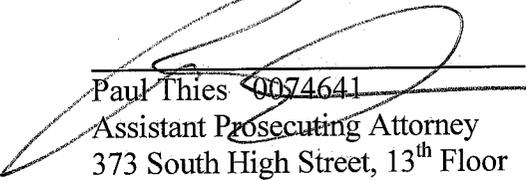
Issuance of Mandamus in this case is not proper. Mandamus should be only if Relator shows (1) that Relator has a clear legal right to the relief requested; (2) that Respondent is under a clear legal duty to perform the requested act; and (3) that Relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Ney v. Niehaus*, 33 Ohio St. 3d 118, 118-19, 515 N.E.2d 914, 916 (1987).

Relator has cited to statutes in his Complaint under the headings "Clear Legal Right to Requested Relief" and "Respondents' Duty to Perform Requested Relief," but has failed to cite to any sort of authority which states he should be entitled to the hearing he seeks or that Respondent is under any duty to provide that sort of relief. The portions of statute that Relator cites to are merely statutes pertaining to divorce and other domestic relations issues that are seemingly related to the substance of the underlying motion. Because Relator has made no showing that he has a clear legal right to the relief requested and that Respondent is under a clear legal duty to perform the requested act, Relator has failed to make the requisite showing under prongs one and two of the requirements for issuance of Mandamus. Therefore, Relator's Action in Mandamus should be dismissed.

IV. Conclusion

For all the foregoing reasons, Relator has failed to state a claim upon which relief can be granted. Therefore, Relator's Action in Mandamus should be denied, and Respondent respectfully requests that the action be dismissed.

Respectfully submitted,
RON O'BRIEN
PROSECUTING ATTORNEY
FRANKLIN COUNTY, OHIO

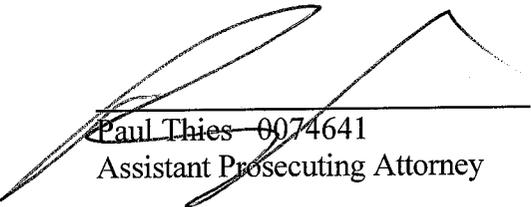


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pthies@franklincountyohio.gov
Counsel for Respondents

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been forwarded by regular U.S. mail, postage prepaid, this 19 day of November, 2012, to:

Chance Catudal, *Pro Se*
2783 Martin Road #353
Chillicothe, Ohio 45601



~~Paul Thies 0074641~~
Assistant Prosecuting Attorney

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY
DIVISION OF DOMESTIC RELATIONS

84521 - C19

1 Chance Catudal, Plaintiff
2 2783 Martin Road # 353
3 Dublin, Ohio 43017

Case # 10DR-12-4934
Judge Kim A. Browne
Magistrate William Sieloff

4
5 vs

6
7 Anna Catudal, Defendant
8 539 South 3rd Street
9 Sierra Vista, Arizona 85635

10
11 **MOTION REQUESTING EMERGENCY EX PARTE ORDER** *KRD*

12
13 Plaintiff Requests an Ex Parte Order naming him as both Custodial and Residential
14 Parent of Haley A Catudal until his Motion to Modify Custody, filed on June 4,
15 2012, has been heard and ruled upon.

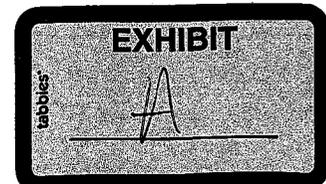
16
17 This Motion is more fully supported by the Memorandum and Affidavits attached
18 and incorporated herein.

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20
21 Respectfully submitted,

22 *Chance Catudal*
23 _____
24 Chance Catudal, Plaintiff

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MEMORANDUM

I. LAW

A. ORC 2919.22 (A).

According to Ohio law, "No person, who is parent, guardian, custodian, person having custody or control, or persons in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support "

II. ARGUMENT

A. Defendant Lied to Your Honor About Previous Child Abuse.

Defendant lied to this Court during Trial about leaving Haley A. Catudal unattended while she went into National City bank for an extended period of time (i.e , Trial Transcript Page 82, Lines 13 – 25, and Page 83, Lines 1 – 10) Said lie made it impossible for this Court to determine who was best suited to be named both Custodial and Residential Parent See Exhibit A for the Child Abuse Complaint that was filed against Defendant on August 5, 2006. Haley A. Catudal was less than six-months old at the time of this incident Furthermore, she was left unattended long enough for CPD to both be called by some random passerby, and for CPD to respond to the call and be at Defendant's car when she came out of the bank.

B. Previous Child Abuse in General.

It is no laughing matter for this Court to render a Judgment Entry – Decree of Divorce having been lied to by both Defendant and Defendant's counsel regards to the Subject Matter herein Plaintiff begs this Court to take notice of this fact and to consider what type of person, more specifically, what type of woman could do this to a child.

C. Current Child Abuse – Duty of Care is a Recognizable Civil Tort.

Plaintiff has already attempted to hold Defendant accountable in the Civil Division of this Court; however, Plaintiff learned two valuable lessons from those proceedings:

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IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY
DIVISION OF DOMESTIC RELATIONS

64521 - C21

- 1) Recognizable Civil Tort;
- 2) Subject Matter Jurisdiction

Plaintiff learned from Black's Law Dictionary, 9th Edition, Page 581 (3), that "Duty of Care" is, "A legal relationship arising from a standard of care, the violation of which subjects the actor to liability."

Plaintiff further learned from Judge Serrott's Decision and Entry in Case # 12CVH02-2279, that the Civil Division of this Court does not, "...have jurisdiction, the legal authority, or power to act, regarding Plaintiff's claims" Plaintiff was politely told to take his grievances up with Domestic Relations.

This Motion is Plaintiff's attempt to bring several grievances to this Court's attention.

Plaintiff's Daughter was delivered to him via Southwest Airlines Flight # 697 on May 26, 2012 at approximately 9:55 PM. Plaintiff noticed almost immediately that Haley A. Catudal had a very persistent and unusual cough considering the time of year. Plaintiff waited for three days for said cough to lessen, but it did not. Plaintiff had Haley A. Catudal taken to the hospital on May 31, 2012 at approximately 10 AM. It took four trips to Children's Hospital to alleviate and cure the neglected cough (i.e., 5/31/2012, 6/7/2012, 6/14/2012, and 6/22/2012). Haley Catudal was seen and treated by the following Doctors:

- 1) Dr. Angela Jones;
- 2) Dr. Brian K. Bowden;
- 3) Dr. Sinimol James;
- 4) Dr. Bonny M. Tsai.

The second visit on June 7, 2012, indicated to Dr. Brian K. Bowden that X-Ray of the lungs were in order. The X-Ray revealed inflammation that was caused by said cough being neglected for an extended period of time and allowed the appropriate course of action to be initiated. The latter visits were to ensure that the current treatment course was indeed working.

Defendant is guilty of violating her Duty of Care that this Court's previous Judgment Entry - Decree of Divorce formalized by naming her both Custodial and Residential Parent of Haley A. Catudal Defendant neglected a simple cough to point of it needing four trips to the hospital to successfully combat. Haley A.

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IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY
DIVISION OF DOMESTIC RELATIONS

64521 - C22

1 Catudal was so accustomed to having the cough that she attempted to ease
2 Plaintiff's worry by stating things like, "It's just a cough, Dad," etc , etc .

3
4 **D. Defendant Purportedly Leaves Child Alone Every Morning.**

5
6 Defendant purportedly leaves Haley A. Catudal alone every morning so that
7 she can get to work on time and later comes back to make sure that Haley gets to
8 school. This is a very clear violation of the Duty of Care that Defendant is charged
9 with simply by being a mother, as well as said Duty being granted via Judgment
10 Entry - Decree of Divorce. Plaintiff learned this from speaking to Haley A.
11 Catudal. It was subsequently confirmed by Defendant in conversation with
12 Plaintiff; however, Defendant alleged that her neighbor (name undisclosed at this
13 time) comes over every morning to watch Haley A Catudal while Defendant is at
14 work Considering all that Plaintiff has had to go through to enjoy any Court
15 Ordered Parenting Time with Haley A. Catudal, and the other documented lies
16 herein, Plaintiff disbelieves Defendant's account of the facts and wishes to uncover
17 the truth at a trial of this matter through Discovery. Depositions, Interrogatories,
18 Adding this babysitter individual as a Party to this Case, etc.

19
20 **E. Motion to Modify Custody.**

21
22 As required by Local Rule 13 (E), Plaintiff filed a Motion to Modify
23 Custody on June 4, 2012 See Exhibit B.

24
25 **F. Defendant Lied To Your Honor About Marcus Van Cleave**

26
27 Defendant lied to this Court during Trial about being in a relationship with
28 Marcus Van Cleave (i e , Trial Transcript Page 57, Lines 4 - 25, Page 58, Lines 10, and Lines 19 - 24). Haley A. Catudal informed someone very close to Plaintiff
29 in confidence (i e , so that "Daddy" would not get "mad"), that she calls Marcus
30 Van Cleave "Dad" and that her understanding was that Marcus Van Cleave is her
31 "Step-Dad" Plaintiff has taken Haley A. Catudal to a licensed psychologist to
32 confirm that this was true. See Exhibit F.

33
34
35 This is not only an additional Count of Contempt discovered and discussed
36 herein, but also an additional dereliction of the Duty of Care. Haley A. Catudal is
37 only six-years old She has been estranged from Plaintiff for approximately three-
38 years and Defendant is confusing her further regarding the Father-Daughter Bond
39 that is essential to her development. Plaintiff is infuriated to learn of this, as
40 should be this Court. See Exhibit C for the Exhibit Plaintiff previously provided to

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1 this Court It is a conversation between Plaintiff and Defendant on January 1,
2 2011. In said conversation, Defendant admits to being in a relationship with
3 Marcus Van Cleave and discloses that they have already discussed marriage.
4 Plaintiff brought up this fact during Trial, but Defendant was able to turn
5 Plaintiff's alerting the Court to this fact into the following: See Trial Transcript
6 Page 60, Lines 16 - 19, "I lied to him because this was probably in January
7 because I wanted him to get over the fact that we were splitting." Exhibit C
8 clearly demonstrates both adults discussing that they were in new relationships and
9 that Defendant is, once again, flat out lying.

10
11 **G. Motion to Add New Party.**

12
13 Plaintiff filed a Motion to Add New Party on June 4, 2012 Said Party to be
14 Added is Marcus Van Cleave. See Exhibit D. Said Motion contains new evidence
15 that Plaintiff's assertion in regards to Marcus Van Cleave was correct, that he is
16 indeed in a committed relationship with Defendant and that his involvement in this
17 matter needs to become a part of the Record for several reasons, namely his
18 involvement with Plaintiff's Daughter and the potential consequences thereof.

19
20 **H. Provision for the Immediate Notice of Ex Parte Order to**
21 **Defendant.**

22
23 Plaintiff will indeed make Defendant immediately aware of any Order that
24 Modifies Custody of Haley A. Catudal. Plaintiff will do this day of via Phone
25 Call, Text Message, Certified Mail, and speaking to Defendant's attorney direct.

26
27 **III. AFFIDAVITS**

28
29 See Exhibit E, F, & G.

30
31 **IV. CONCLUSION**

32
33 This Motion, supported by both Memorandum, and several Affidavits,
34 clearly indicates to this Court that the Custody and designation of Residential
35 Parent of Haley A. Catudal should be temporarily awarded to Plaintiff.

36
37 **V. REQUEST FOR RELIEF**

38
39 Plaintiff requests a Temporary Emergency Ex Parte Order designating him
40 as both Custodial and Residential Parent of Haley A. Catudal

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V. EXHIBITS

- A. Child Abuse Complaint filed against Defendant on August 5, 2006;
- B. See Motion to Modify Custody filed on June 4, 2012;
- C. Conversation with Defendant on January 1, 2011;
- D. See Motion to Add New Party filed on June 4, 2012;
- E. Affidavit of Dr. Brian K. Bowden;
- F. Affidavit of Dr. Jeff D. Sherrill;
- G. Affidavit of Chance Catudal.

Respectfully submitted,


Chance Catudal, Plaintiff

CERTIFICATE OF SERVICE

Plaintiff hereby certifies that a true and accurate copy of the foregoing Motion was served upon all parties or their counsel in person on the 2 day of July, 2012


Chance Catudal, Plaintiff

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FRANKLIN CO. OHIO

STATEMENT

Plaintiff declares under penalty of perjury that the foregoing Certificate of Service is true and correct


Chance Catudal, Plaintiff

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FURTHER AFFIANT SAYETH NAUGHT.

Chance Catudal
Chance Catudal, Affiant

Sworn to before me and subscribed in my presence this 29th day of
October, 2012.

Randi J. Good
Notary Public



RANDI J. GOOD
Notary Public, State of Ohio
My Commission Expires March 5, 2017

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS AND JUVENILE BRANCH

IN THE MATTER OF: _____

Chance Catudal
PLAINTIFF/PETITIONER

CASE NO. 10 DR 4934

JUDGE Brazner

v.

Anna Catudal
DEFENDANT/PETITIONER

MAGISTRATE Sieff

MAGISTRATE'S ORDER

This matter came on for hearing pursuant to Various Motions

Upon consideration of the matter, it is ORDERED Parties shall have telephone contact w/ Haley 1x per day at a time the parties mutually agree. If the parties are unable to agree telephone calls shall ~~occur~~ ~~before~~ be initiated between the ~~two~~ hours of 7³⁰ pm and 8³⁰ pm. Both parties shall provide a number for telephone contact forthwith; if the child is unavailable, a return phone call shall be made as soon as possible. Times shall be based on Haley's current location. Child permitted to call per local rule.

MAGISTRATE

Sieff

Chance Catudal
Attorney for Plaintiff/Petitioner

Bryan Bowen
Attorney for Defendant/Petitioner

