

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE ex rel.
LARRY KLAYMAN
2020 Pennsylvania Ave, NW
Suite 800
Washington, D.C. 20006

Case No.: 2013-0296

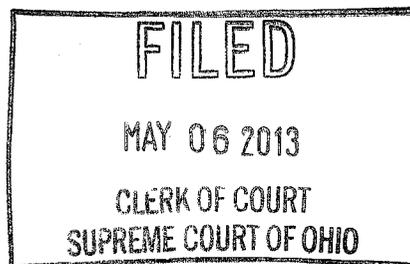
Relator,

Original Action in Mandamus

v.

Cuyahoga County Court
of Common Pleas, Domestic
Relations Court, et. al.

Respondents.



RELATOR'S MOTION FOR RECONSIDERATION

Pursuant to the Supreme Court Rules of Practice ("S.Ct.Prac.R.") Rule 18.02(B) Relator Larry Klayman hereby moves for reconsideration of the Court's order of April 24, 2013 which denied Relator's Motion to Strike and dismissed this cause.

ARGUMENT

Reconsideration Is Requested Since Relator Never Did Not Have Time to Respond to Respondent's Motion To Dismiss.

On February 14, 2013 Relator filed his Verified Petition For Writ Of Mandamus, which he is hereby incorporating by reference. On March 13, 2013, Respondent Cuyahoga County filed its Motion to Dismiss. On March 22, 2013 Relator received the Motion to Dismiss, leaving only one day for him to fully research and brief an opposition. This was the first time that Relator had become aware of this motion, and he had no opportunity to otherwise research or draft an opposition.

Relator submitted the sworn affidavit of Harry Smith, the manager of the facility in which Relator receives his mail. Exhibit 1. Mr. Smith stated, under oath, that there was an unknown problem with the D.C. post office that was causing delays of a week or more in receiving incoming mail. Relator immediately sought to extend the time to file an opposition, and the Respondent consented to such an extension.

Relator sought to immediately file this extension and was told by someone who identified herself as Kim in the Clerk's Office that there were provisions for an extension for a motion to dismiss under the Supreme Court Rules of Practice. Exhibit 2. Kim also advised that S.Ct.Prac.R. 3.11 (D)(2) could be used as an alternate means of moving for additional time given the fact that the motion to dismiss was not received until there was very little time to respond and that Relator should await an order from the Court before taking any further action. *Id.* S.Ct.Prac.R. 3.11 (D)(2) states in its entirety: "If the Supreme Court determines that service was not made as required by this rule, it may strike the document or, if the interests of justice warrant, order that the document be served and impose a new deadline for filing any responsive document."

Relator was advised by Kim in the Clerk's Office that no action should be taken until this Court ruled on his motion. If Relator had known that no extension would be given he would have done whatever was necessary to respond to Respondent's Motion to Dismiss before the deadline.

Relator respectfully requests reconsideration of this motion simply to be given a chance to respond to the Respondent's motion. In the interest of fairness and justice and due process of law, Relator should be given nothing more than simply an opportunity to respond and oppose the Respondent's motion. To have this cause dismissed before Relator has an opportunity to respond

would amount to a miscarriage of justice caused by nothing more than a delay in the mail system.

This Court should respectfully consider the fact that the conduct of judicial officers is at issue in this cause.¹ It is certainly the duty of the Ohio Supreme Court to ensure that all those seeking relief from the courts, at every level, are treated in a just manner.

Dismissing This Lawsuit Violates Relator's Due Process Rights

Dismissing this lawsuit without giving the Relator an opportunity to be heard violates the basic tenants of the due process clause of the Ohio and U.S. Constitutions. As one of the basic tenants of the judicial system, "[p]rocedural due process requires that all parties be given reasonable notice of the pendency of an action and an opportunity for a hearing where their objections can be presented." *Faries v. Director, Office of Workers' Comp. Prog.* (C.A.6, 1990), 909 F.2d 170, 173. Here, the Relator will be deprived of not only notice of the motion to dismiss, but also of the opportunity to be heard before his cause is dismissed. The two motions, which were received with one day left to respond and past the deadline to respond, respectively, did not provide the adequate notice that the procedural due process guarantees for even the most basic deprivations of a person's rights. This lack of notice meant that Relator was unable to be heard before the first of these dispositive motions was granted, dismissing the entirety of this cause. There is no reason why Relator should not be given his rightful opportunity to be heard in this cause so that the case may be heard on the merits.

¹ Relator, in his Verified Petition For Writ of Mandamus, detailed numerous instances of bias and prejudice carried out against him during the family court trial, for which the judicial officers should be disqualified and their orders vacated. Verified Petition For Writ Of Mandamus ¶ 34.

Dismissing This Cause Goes Against Fundamental Tenants of the Ohio Courts

As this Court has repeatedly instructed, it is a fundamental tenant of the Ohio Courts that a case should be heard on the merits. See, e.g. *Hawkins v. Marion Correctional Institute*, 28 Ohio St. 3d 4, 5 (Ohio 1986) ("[I]f the court of appeals had followed the fundamental tenet of judicial review in Ohio that courts should decide cases on the merits, it would have properly exercised its discretion and not dismissed appellant's appeal."); *De Hart v. Aetna Life Ins. Co.*, 69 Ohio St. 2d 189, 192 (Ohio 1982) ("Initially, in evaluating the propriety of the Court of Appeals' action, we hasten to emphasize -- indeed re-emphasize -- that it is a fundamental tenet of judicial review in Ohio that courts should decide cases on the merits. Judicial discretion must be carefully -- and cautiously -- exercised before this court will uphold an outright dismissal of a case on purely procedural grounds.")(Internal citations omitted).

In *De Hart*, supra, this Court, in considering local appellate rules, empathetically ruled that the "rules must encourage promptness and efficiency, on the one hand, and fairness and justice on the other. Fairness and justice are best served when a court disposes of a case on the merits. *Only a flagrant, substantial disregard for the court rules can justify a dismissal on procedural grounds.*" *De Hart*, 69 Ohio St. 2d at 192-193 (Emphasis added).

Here, this case was dismissed simply because Relator of an apparent problem with the U.S. Post Office. Fairness and justice are firmly on the side of Relator, who had only a single business day to research and oppose one motion to dismiss, and received a separate motion to dismiss after the time to respond had already passed. Relator immediately sought relief from this Court and respectfully requests that this Court reconsider its ruling of April 24, 2013 and grant

additional time for Relator to respond to the Respondents' respective motions to dismiss so that that cause may be heard on its merits.

Relator Sought Viable Claims Under This Writ of Mandamus

"[A] writ of mandamus is appropriate to require a lower court to comply with and not to proceed contrary to the mandate of a superior court." *State ex rel. Obojski v. Perciak*, 113 Ohio St. 3d 486, 489 (Ohio 2007) citing *State ex rel. Dannaher v. Crawford* (1997), 78 Ohio St.3d 391, 394, 1997 Ohio 72, 678 N.E.2d 549. In this case, it is clear that the Court of Common Pleas and the Court of Appeals are defying established blackletter law. The Court of Appeals conceded that the choice of law provision of the Consent Marital Settlement Agreement governs. The Court of Appeals further conceded that Virginia law must apply to the "enforceability," of the Consent Marital Settlement Agreement. The Court of Appeals then erred by ignoring that "enforceability" is exactly what is at issue. The Respondent's contempt action, which was on appeal, regarding child support is an "enforcement" action.

For a writ of mandamus to issue, a Relator needs to only demonstrate a clear legal right to the requested relief, a clear legal duty on the part of respondents to provide it, and the lack of an adequate remedy in the ordinary course of the law. See *State ex rel. Eshleman v. Fornshell*, 125 Ohio St. 3d 1, 5 (Ohio 2010). Here, it is indisputable that Relator Klayman is entitled to the right of due process and equal protection of the laws before having his children taken away from him and having to pay the attorneys fees incorrectly awarded to Respondent. Under the authority of the state of Ohio, the Court of Common Pleas and the Court of Appeals are under a clear duty to provide Relator with the due process and equal protection that is owed to him. In addition, Relator has pursued every avenue available to him under the law, including an attempted appeal to the Supreme Court of Ohio. However, no appeal to the Supreme Court of Ohio even took

place, as the court declined to exercise jurisdiction. This has left Relator with no adequate remedy in the course of law. A writ of mandamus is thus the only remedy that Relator has available and is the appropriate and proper remedy.

Importantly, the Court of Appeals conceded that there are two judgment entries at issue, but then ignores the appealed contempt finding for non-payment of child support (an “enforcement action”). Judge Mary Boyle writes at page 1 that “Plaintiff Appellant Larry Klayman appeals from two judgments denying his motion to modify parental rights and responsibilities and finding him in contempt of court.” Exhibit 5, Verified Petition For Writ Of Mandamus. Virginia law applies at a minimum to adjudication of the contempt motion against Klayman.

This contempt motion directly concerns “enforceability” of the child support provision in the Consent Marital Settlement Agreement. Under Virginia law, the decision in *Hartman v. Hartman*, 33 Vir. Cir. 373, 1994 WL 1031136 (Apr. 13, 1994) provides a complete defense to the “enforcement” of child support. In *Hartman*, as in this case, the mother cut off the father’s access to the children and told the child that someone else was his father. The court absolved the father from having to pay any child support payments to the mother of the child. This case involving the Relator, contrary to the strained and biased “reasoning” of the Magistrate and Ms. Luck, is even more extreme than *Hartman*, as Ms. Luck not only unilaterally, without court order, cut off contact with the children – in effect kidnapped them -- for the better part of four years, but she also made heinous false charges of child sexual abuse and alienated them by also telling them that Relator intended to take the children away from their family and friends. In so doing, Ms. Luck admittedly shared the custody petition of Relator with the children to try to coerce and scare them into joining her felonious scheme.

Importantly, courts of other jurisdictions also recognize that child support obligations can and should be vitiated under similar circumstances and that denial of visitation rights can serve as a defense to nonpayment. See *Adams v. Adams*, 92 A.D.2d 644, 459 N.Y.S. 2d 927 (3rd Dept. 1983); *In re Marriage of Walters*, 59 Cal. App. 4th 998; *Dunne v. Amerigan*, 354 Mass. 368, 237 N.E. 2d 689 (1968); *Catherine W. v Robert F.*, 116 Misc. 2d 377, 455 N.Y.S. 2d 519 (Fam. Ct. 1982); *Cole v. Earon*, 26 N.C. App. 502, 216 S.E. 2d 422 (1975); *Davis v. Davis*, 55 Ohio App. 3d 196, 563 N.E. 2d 320 (8th Dist. 1988).

The hard fact is that Respondent sought to enforce the Consent Marital Settlement Agreement by seeking and obtaining the contempt order which is on appeal, when Relator rightly refused to pay child support under the precedent of *Hartman*. This Virginia law precedent relieved Relator from the payment of child support under these very extreme circumstances. Contrary to Respondent's misstatements, the issue here is not whether the Consent Marital Settlement Agreement is valid and thus enforceable – indeed it was entered into by consent of both parties – the issue is whether the child support provision can be “enforced” under these extreme circumstances.² And that is why the Consent Marital Settlement Agreement, which was drafted by Relator's Virginia counsel at the time, contained a choice of law provision to apply Virginia law if the Consent Marital Settlement Agreement ever had to be enforced by either party.

² Relator Klayman had religiously paid child support up to the time of the false allegations. Moreover, Ms. Luck and her husband are well off -- with a family income over \$150,000 per year and living in a house, which is likely free and clear of any mortgage by this time. Relator Klayman has paid about a million dollars to Ms. Luck as a result of and since the parties divorced. Thus, the children are not without means and Relator should not have to pay child support where he has been unilaterally prohibited by the ex spouse, even to this day, from seeing or talking to his children for many years, now going on 6 years as of this date.

Since Virginia law was not applied in the lower court decision, the entirety of that decision must respectfully be declared null and void. Using the applicable Virginia law, it was and is clear that Relator was under no obligation to pay his child support payments once his children were taken away for many years and effectively kidnapped from him. This Court must respectfully order that no child support is due and owing under these circumstances. Relator's case must be remanded to the Court of Common Pleas or the Court of Appeals with instructions to apply Virginia law to the entirety of those proceedings and to retry the case. In addition, since any and all attorneys fees awarded to Ms. Luck flow from what are null and void judgment entries, this award must respectfully be set aside.

CONCLUSION

Relator seeks simply to reverse the injustice that has occurred to him as a result of the Domestic Relations Division of the Cuyahoga County Court of Common Pleas Court and the Court of Appeals of Ohio, Eighth Appellate District. To not be given the opportunity to be heard on this motion, and to simply dismiss it because of a delay in the delivery of the mail would be a violation of Relator's rights of procedural due process and a stark failure by this court to ensure that all those within its jurisdiction are treated justly. In addition, it would be contrary to the fundamental tenant repeatedly prescribed by this Court that cases should be decided on the merits. Relator seeks simply to be heard on this matter, nothing more.

WHEREFORE, in the interest of fairness and justice and to prevent a manifest injustice, Relator Klayman respectfully moves for reconsideration of this Court's decision of April 24, 2013 and to have this case reinstated, and to have a new deadline imposed pursuant to S.Ct.Prac.R. 3.11 (D)(2) so that Relator may have the time needed to respond to Respondent's motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'L. Klayman', written over a horizontal line.

Larry Klayman

2020 Pennsylvania Ave. NW Suite 800

Washington, D.C. 20006

Email: leklayman@gmail.com

Tel: (310) 595-0800

Relator in pro se

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Relator's Motion For Reconsideration Motion To Dismiss was served by regular U.S. mail, postage prepaid, on May 06, 2013 upon the following:

Darlene Fawkes Pettit
Sarah Pierce
Assistant Attorneys General
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Timothy McGinty
Prosecuting Attorney
Cuyahoga County Prosecutor's Office
1200 Ontario St., 8th Fl.
Cleveland, Ohio 44113



Larry Klayman

Relator in pro se

Exhibit 1

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Respondents.

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AFFIDAVIT OF HARRY SMITH

My name is Harry Smith, I am a citizen over 18 years of age and conduct business within the District of Columbia, and hereby swear, to the best of my knowledge and belief, as follows:

1. I am the manager of the UPS Store located at 2020 Pennsylvania Ave., NW, Washington, D.C.
2. Several of my customers have been recently complaining that their mail has not been timely received and that there have been delays in the arrival of expected mail.
3. It is my belief that the District of Columbia Post Office, which supplies mail to this UPS Store location, is experiencing some sort of backup or other delay that is causing my customers to not receive their mail timely.

4. I am uncertain about when this problem will be resolved and the District of Columbia Post Office has not provided me with any sort of answers about what the problem is or when it will be fixed.

FURTHER AFFIANT SAYETH NAUGHT

Dated: April 9, 2013



**Harry Smith
Manager
UPS Store**

Exhibit 2

IN THE SUPREME COURT OF OHIO

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LARRY KLAYMAN
2020 Pennsylvania Ave, NW
Suite 800
Washington, D.C. 20006

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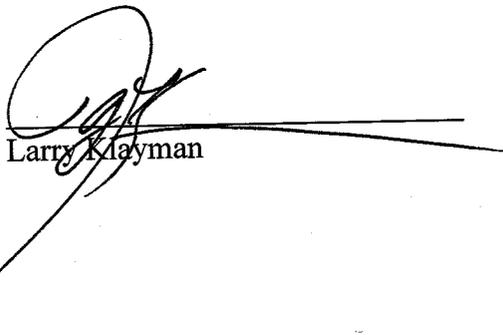
AFFIDAVIT OF LARRY KLAYMAN

My name is Larry Klayman, I am a citizen over 18 years of age, and hereby swear, to the best of my knowledge and belief, as follows:

1. I did not receive Respondent Eighth District Court of Appeals' Motion to Dismiss until March 22, 2013. This was the first time that I became aware of the Motion to Dismiss.
2. I immediately drafted a motion for enlargement of time to file a response to the Motion to Dismiss.
3. When I attempted to file the motion for enlargement it was rejected by the Court. Kim from the clerk's office called to inform me that enlargement was not available for a motion to dismiss.

4. Kim then advised my assistant and I that I could file a motion to strike as an alternative means to seek an extension since the delay in the mail delivery had severely limited my opportunity to respond.
5. Kim then advised me that I would and should not to do anything further until the Court ruled on my motion.
6. A second motion to dismiss was filed by Respondent Cuyahoga County Court of Common Pleas on March 19, 2013. I did not receive this Motion to Dismiss until April 8, 2013, after the deadline to file a response had already passed.
7. I also contacted Harry Smith, the manager of the facility in which I receive my mail in order to inquire about why my mail delivery was being delayed. Mr. Smith informed me about problems with the U.S. Post Office in Washington, D.C.

FURTHER AFFIANT SAYETH NAUGHT

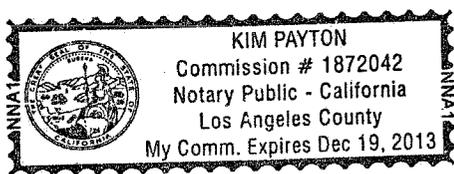

 Larry Klayman

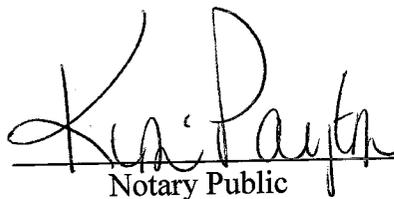
STATE OF CALIFORNIA)
) ss.
 COUNTY OF LOS ANGELES)

The foregoing instrument was subscribed and sworn to before me this 3rd day of May, 2013.

Witness my hand and official seal.

My commission expires: 12-19-2013




 Notary Public