[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13253
Non-Argument Calendar

D.C. Docket No. 1:17-cv-02194-AT

JOSEPH DINGLER,
on behalf of himself and all persons similarly situated,

Plaintiff - Appellant,

ASHTON DINGLER,

Plaintiff,

versus

STATE OF GEORGIA,
GA DIV. OF FAMILY & CHILDREN SERVICES,
DIR. BOBBY CAGLE,
DFCS,
FULTON COUNTY GEORGIA, FAMILY COURT,
CATHELENE TINA ROBERSON,
Clerk,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(February 23, 2018)

Before MARCUS, ROSENBAUM, and JULIE CARNES, Circuit Judges.

PER CURIAM:

Joseph Dingler ("Plaintiff") filed a petition in Georgia state court to legitimize himself as the father of his unborn child and to appoint a guardian ad litem. At the same time, Plaintiff, proceeding *pro se*, filed a federal complaint on behalf of himself, his unborn child, and a class of unborn children against the state of Georgia, the Georgia Division of Family and Children Services, the Division's director, Fulton County Family Court, and the court's clerk. Plaintiff alleged that, in violation of Georgia state law, the Georgia Constitution, and the United States Constitution, he had been deprived of access to state courts, his ability to assert his parental interest in his unborn child, and a guardian ad litem. The district court dismissed Plaintiff's complaint *sua sponte* for being frivolous under 28 U.S.C. § 1915 and denied Plaintiff's post-judgment motions challenging the court's dismissal. Now, on appeal, Plaintiff argues that dismissing his complaint violated

his constitutional rights, among other errors. We disagree and **AFFIRM** the district court.

I. BACKGROUND

According to Plaintiff's complaint, Plaintiff impregnated a woman to whom he was not married in late 2016. Around May 2017, Plaintiff became concerned over the unborn child's safety and sought to legitimize himself as the child's father. At the same time, he also sought to have a guardian ad litem appointed to prevent the mother from having an abortion or putting the child up for adoption.

In the process of filing his petition for legitimization and a guardian ad litem, Plaintiff was given conflicting information over what Georgia court or agency he should file his petition with. Eventually, Plaintiff was told by the Georgia Division of Family and Children Services that it had no authority to legitimize Plaintiff as the child's father or to appoint a guardian ad litem because the child had not been born yet. On May 22, Plaintiff filed a petition for an emergency hearing in Fulton County Superior Court to address both issues.

While his state court action was still pending, Plaintiff, proceeding *pro se*, filed a lawsuit in the federal district court against the State of Georgia, the Georgia Division of Family and Children Services, the Division's director Bobby Cagle, Fulton County Family Court, and court clerk Cathlene Tina Robinson. Plaintiff

asserted claims on behalf of himself, his unborn child, and a class of unborn children including "all 'persons' . . . . over the 28 week age of viability." Plaintiff sought a writ of mandamus "requiring [the defendants] to provide effective remedy" for alleged violations of the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, unspecified articles of the Georgia Constitution, and O.C.G.A. § 19-7-5, which requires certain persons and entities to report child abuse. Plaintiff also sought declaratory relief and injunctive relief for alleged violations of both his, his unborn child's, and the class's rights under the First, Sixth, and Fourteenth Amendments of the United States Constitution and paragraphs I, II, and XIV of Article I, § I of the Georgia Constitution.

Plaintiff filed a motion to proceed *in forma pauperis* under 28 U.S.C. § 1915, and the district court granted the motion. Pursuant to 28 U.S.C. § 1915(e)(2)(b)(i),[1] the district court determined that Plaintiff's complaint was frivolous and dismissed it *sua sponte* before the complaint was served on the defendants. The court also entered an order of final judgment.

Plaintiff then filed a motion for reconsideration, a motion to amend the complaint, a motion for an emergency preliminary injunction, and a motion for the

[1] "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . is frivolous or malicious." 28 U.S.C. § 1915(e)(2)(B)(i).

appointment of a guardian ad litem. The district court denied Plaintiff's motion for reconsideration and denied the remaining motions as moot. Plaintiff filed a timely appeal under 28 U.S.C. § 1291.

II. STANDARD OF REVIEW

We review questions of constitutional law *de novo*. *United States v. Ward*, 486 F.3d 1212, 1221 (11th Cir. 2007). We review for abuse of discretion a district court's dismissal of a complaint under § 1915(e)(2), *Bilal v. Driver*, 251 F.3d 1346, 1349 (11th Cir. 2001), dismissal of a declaratory judgment claim, *Smith v. Casey*, 741 F.3d 1236, 1244 (11th Cir. 2014), and denial of a reconsideration motion under Rule 59(e), *Case v. Eslinger*, 555 F.3d 1317, 1325 (11th Cir. 2009).

III. DISCUSSION

On appeal, Plaintiff challenges the dismissal of his complaint in two ways: (1) by attacking § 1915(e)(2)(B)(i)'s constitutionality and (2) by challenging the district court's application of § 1915(e)(2)(B)(i) to a non-prisoner, as well as the court's frivolity determination in general. Plaintiff also contends that the district court erred by denying his Rule 59(e) motion to alter or amend the judgment and his motion to amend the complaint. Before turning to these issues, we note that we consider only Plaintiff's claims raised on his own behalf because a non-attorney

pro se litigant cannot bring any action on behalf of his or her child. *Devine v. Indian River Cty. Sch. Bd.*, 121 F.3d 576, 581 (11th Cir. 1997).

A. The District Court's Application of Section 1915(e)(2)(B)(i) to Plaintiff was Constitutional

Plaintiff begins by challenging § 1915(e)(2)(B)(i) as violating his right of access to the courts, violating the Equal Protection Clause by treating indigent plaintiffs differently than plaintiffs who pay filing fees, and constituting an unconstitutional bill of attainder. This Court has already rejected the proposition that a functionally identical subsection of the same statute violates indigent plaintiffs' right of access to the courts and the Equal Protection Clause. *See Farese v. Scherer*, 342 F.3d 1223, 1227 n.5 (11th Cir. 2003) (holding that due process and equal protection challenges to § 1915(e)(2)(B)(ii) were "without merit"); *Vanderberg v. Donaldson*, 259 F.3d 1321, 1324 (11th Cir. 2001) ("[S]ection 1915(e)(2)(B)(ii) . . . does not violate the Equal Protection Clause . . . . [and *sua sponte* dismissal] did not deny Plaintiff due process.").[2] Because Plaintiff's challenges to § 1915(e)(2)(B)(i) are the same, we must reject them as well.

[2] Unlike § 1915(e)(2)(B)(i), which commands courts to dismiss "frivolous or malicious" actions, § 1915(e)(2)(B)(ii) states that courts shall dismiss actions that "fail[ ] to state a claim on which relief may be granted." For the purposes of Plaintiff's arguments, the two subsections are functionally identical because both require *sua sponte* dismissal of unpaid complaints.

Next, Plaintiff contends that § 1915(e)(2)(B)(i) violates the Constitution's prohibition on bills of attainder. *See* U.S. Const., Art. I, § 9, cl. 3 ("No Bill of Attainder . . . shall be passed."). "A bill of attainder is 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.'" *Houston v. Williams*, 547 F.3d 1357, 1364 (11th Cir. 2008) (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977)).[3] To qualify as an unconstitutional bill of attainder, the statute must have three characteristics: "specification of the affected persons, punishment, and lack of a judicial trial." *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 846–47 (1984). "[O]nly the clearest proof . . . suffice[s] to establish the unconstitutionality of a statute on such a ground." *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 83 (1961) (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

Section 1915(e)(2)(B)(i) is not a bill of attainder, because it does not impose punishment. To the contrary, it furthers "the government's legitimate interests in deterring meritless claims and conserving judicial resources." *Vanderberg*, 259 F.3d at 1324. Because § 1915(e)(2)(B)(i) "furthers the non-punitive goal of

[3] Historically, bills of attainder were also known as "bills of pains and penalties" if they "prescribed a penalty short of death." *United States v. Brown*, 381 U.S. 437, 441 (1965). The Constitution prohibits all bills of attainder, "of any form or severity." *Id.* at 447.

allocating resources, and no intent to punish can be established from the record," Plaintiff's argument "has no merit." *Houston*, 547 F.3d at 1364.[4]

B. The District Court did not Abuse its Discretion by Dismissing the Complaint Without Opportunity to Amend and Denying Plaintiff's Motion to Alter or Amend the Judgment

Plaintiff challenges the dismissal of his complaint in two ways. First, Plaintiff contends that the district court erred by applying § 1915(e)(2)(B)(i) to a non-prisoner. Yet it plainly applies to anyone proceeding *in forma pauperis*, "prisoners and non-prisoners alike." *Rowe v. Shake*, 196 F.3d 778, 783 (7th Cir. 1999); *see also Troville v. Venz*, 303 F.3d 1256, 1260 (11th Cir. 2002) (finding "no error in the district court's dismissal of [a non-prisoner's] complaint" under § 1915(e)).

Second, Plaintiff argues generally that the district court abused its discretion by dismissing his complaint and not allowing him an opportunity to amend. Notably, Plaintiff does not argue that his claims were not frivolous on the merits or that amendment would correct his original complaint's flaws, but instead accuses

[4] Plaintiff also suggests in a single sentence of his brief that an unspecified Georgia law "'attains' unwed biological fathers." But "passing references" alone are insufficient to properly preserve an issue for appeal. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). Thus, we do not consider this issue.

the district court of class-based and political bias.[5] The record, however, reveals no trace of bias or even a scintilla of evidence to support Plaintiff's accusations.

Plaintiff also suggests that the district court may have applied a heightened pleading standard. Yet the district court acknowledged the liberal pleading standard applied to *pro se* litigants. *Trawinski v. United Tech.*, 313 F.3d 1295, 1297 (11th Cir. 2002). And we discern nothing in the district court's orders that suggests it may have implicitly applied a higher standard.

Further, although "we read briefs filed by *pro se* litigants liberally, issues not briefed on appeal by a *pro se* litigant are deemed abandoned." *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (citations omitted). "[S]imply stating that an issue exists, without further argument or discussion, constitutes abandonment of that issue and precludes our considering the issue on appeal." *Singh v. U.S. Attorney Gen.*, 561 F.3d 1275, 1278–79 (11th Cir. 2009); *see also Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (a claim raised on appeal "in a perfunctory manner without supporting arguments and authority" is considered abandoned). Thus, Plaintiff abandoned any contention that his claims

[5] The closest Plaintiff comes to addressing the actual merits of the district court's frivolity determination is a single sentence—in the middle of his equal protection challenge—when he states that he "believes, although inartful, [that] he has satisfied both [frivolity] prongs."

themselves were not frivolous on their merits and that his amended claims would have cured any defects.

For this same reason, Plaintiff also abandoned any argument that the district court abused its discretion by denying his Rule 59(e) motion to alter or amend the judgment. Plaintiff's mere statement of the standard of review for such a motion—without more—is insufficient to preserve it for appeal. *See Singh*, 561 F.3d at 1278–79; *Sapuppo*, 739 F.3d at 681.

CONCLUSION

For the reasons stated above, we **AFFIRM** the district court.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13253-EE

JOSEPH DINGLER,
on behalf of himself and all persons similarly situated,

Plaintiff - Appellant,

ASHTON DINGLER,

Plaintiff,

versus

STATE OF GEORGIA,
GA DIV. OF FAMILY & CHILDREN SERVICES,
DIR. BOBBY CAGLE,
DFCS,
FULTON COUNTY GEORGIA, FAMILY COURT,
CATHELENE TINA ROBERSON,
Clerk,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARCUS, ROSENBAUM, JULIE CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOSEPH DINGLER, and ASHTON DINGLER on behalf of themselves and all persons similarly situated, Plaintiffs, v. THE STATE OF GEORGIA, GA. DIV. OF FAMILY & CHILDREN SERVICES, DIR. BOBBY CAGLE, DFCS, FULTON COUNTY, GEORGIA, FAMILY COURT, CLERK, CATHELENE TINA ROBINSON, Defendants.	:	CIVIL ACTION NO. 1:17-cv-2194-AT

ORDER

This matter is before the Court on a frivolity screening required under 28 U.S.C. § 1915 and on Plaintiff, Joseph Dingler's, request for a preliminary injunction in his *pro se* Petition for Extraordinary Relief by Mandamus and Complaint for Injunctive, Declaratory Relief.

I. BACKGROUND

Plaintiff Joseph Dingler files this petition on his own behalf and on behalf of his unborn child to protect the child from potential injury arising out of the use of prescription anti-psychotic/anti-depressant medication by the child's mother, H.

Moore.[1] Dingler is not married to Ms. Moore. On May 22, 2017, Dingler filed a Petition for Legitimation and a Motion for Emergency Hearing on his Legitimation Petition and to Appoint a Guardian Ad Litem in the Family Division of the Fulton County Superior Court.

Dingler alleges that the family court declined jurisdiction over his request for an emergency hearing to secure standing to act in the interest of his child and advised him that only the Department of Family and Child Services ("DFCS") could act expeditiously in the manner requested. After making a complaint with DFCS, Dingler alleges he was advised that DFCS lacked authority because the child is not yet born and the only available remedy through DFCS is to remove the child from the home.

On June 14, 2017, Dingler filed his Petition for Extraordinary Relief by Mandamus and Complaint for Injunctive, Declaratory Relief, in this Court asserting the following claims for relief:[2] mandamus, declaratory relief, injunctive relief, various constitutional violations for denial of Guardian Ad Litem, and denial of due process.

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[1] Plaintiff also asserts certain class action allegations on behalf of a class of persons including fetuses who have reached the age of viability and survive outside the womb.

[2] More specifically, claims include Count A: Mandamus Absolute; Count B: Declaratory Relief; Count C: Permanent Injunctive Relief; Count D: Denial of Guardian Ad Litem In Violation of the 1st and 6th Amendments to the U.S. Constitution; Count E: Denial of Guardian Ad Litem In Violation of Georgia Constitution Art. I, §1, ¶ XIV; Count F: Denial of Guardian Ad Litem In Violation of Fourteenth Amendment to the U.S. Constitution; Count G: Denial of Guardian Ad Litem In Violation of Georgia Constitution Art. I, §1, ¶ II; Count H: Denial of Due Process In Violation of Fourteenth Amendment to the U.S. Constitution; and Count I: Denial of Due Process In Violation of Georgia Constitution Art. I, §1, ¶ 1.The Petition also includes a heading for "Count J: Denial of Due Process In Violation of Georgia Constitution Art. I, §1, ¶ 1" which is identical to Count I, but contains no substantive enumerated allegations.

Dingler seeks a preliminary injunction requiring Respondents to "provide effective, adequately funded, and conflict-free Guardian Ad Litem for a person, minor as defined by DFCS and required by the U.S. and Georgia Constitutions." He also makes the following additional requests in his Prayer for Relief:

A. Certify the case as a class action;

B. Grant mandamus nisi and, upon hearing, issue mandamus absolute requiring Respondents to provide effective and conflict free access to the Courts, Guardian Ad Litem under predetermined circumstances by the U.S. and Georgia constitutions;

C. Enjoin all persons within the scope of an injunction under O.C.G.A. 9-11-65(d) from proceeding against any unnamed party without full access to the Courts, Guardian Ad Litem as the Georgia Department's aim to serve is considered;

D. Grant preliminary and permanent injunctive relief requiring Respondents to provide effective, adequately funded, and conflict-free Guardian Ad Litem for a person, minor as defined by DFCS and required by the U.S. and Georgia Constitutions;

E. Order appropriate further system-wide remedial relief to ensure Respondents' future compliance with their legal and constitutional obligations to Petitioners;

F. Declare that:

1. Respondents have deprived Petitioners of their constitutional right to effective, adequately funded, and conflict-free Guardian Ad Litem resulting in harm and a continuing threat of harm;

2. A constitutionally compliant system, process and Courts of providing indigent persons with an asserted paternal right the expedited means of access to assert those claims and that free exercise of those liberties, thereafter;

3. A constitutionally compliant system of providing Equal Protection of all persons that have reached & passed the "age of viability;"

4. If a constitutionally compliant system for appointing effective, conflict-free Guardian Ad Litem is not established within 60 days of the Court's Order, that Petitioners have been denied due process of law;

5. If a constitutionally compliant system for appointing effective, conflict-free Guardian Ad Litem is not established within 60 days of the Court's Order, that the continuing irreparable harm to Respondents be deemed unlawful under criminal statutes and clearly unconstitutional.

Dingler also seeks an award of costs and attorney's fees.

II. DISCUSSION

A. STANDARD OF REVIEW

Title 28 U.S.C. § 1915(e)(2) requires a federal court to dismiss an action if it (1) is frivolous or malicious, or (2) fails to state a claim upon which relief may be granted. The purpose of Section 1915(e)(2) is "to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). A dismissal pursuant to Section 1915(e)(2) may be made *sua sponte* by the Court prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering frivolous complaints. *Id.* at 324.

A claim is frivolous "where it lacks an arguable basis either in law or in fact." *Id.* at 325. In other words, a complaint is frivolous when it "has little or no chance of success" — for example, when it appears "from the face of the

complaint that the factual allegations are clearly baseless[,] the legal theories are indisputably meritless," or "seeks to enforce a right that clearly does not exist." *Carroll v. Gross*, 984 F.2d 392, 393 (11th Cir. 1993) (internal quotations omitted); *see also Neitzke v. Williams*, 490 U.S. at 327. In the context of a frivolity determination, the Court's authority to "'pierce the veil of the complaint's factual allegations' means that a court is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations." *Denton v. Hernandez*, 504 U.S. 25, 32 (1992) (quoting *Neitzke v. Williams*, 490 U.S. at 325).

A complaint fails to state a claim when it does not include "enough factual matter (taken as true)" to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) (noting that "[f]actual allegations must be enough to raise a right to relief above the speculative level," and complaint "must contain something more . . . than . . . statement of facts that merely creates a suspicion [of] a legally cognizable right of action"); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 680-685 (2009); *Oxford Asset Mgmt. v. Jaharis*, 297 F.3d 1182, 1187-88 (11th Cir. 2002) (stating that "conclusory allegations, unwarranted deductions of facts[,] or legal conclusions masquerading as facts will not prevent dismissal"). While the Federal Rules do not require specific facts to be pled for every element of a claim or that claims be pled with precision, "it is still necessary that a complaint 'contain either direct or inferential allegations respecting all the

material elements necessary to sustain a recovery under some viable legal theory.'" *Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282-83 (11th Cir. 2007). A plaintiff is required to present "more than an unadorned, the-defendant-unlawfully-harmed-me accusation" and "'naked assertion[s]' devoid of 'further factual enhancement'" do not suffice. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

The Court recognizes that Plaintiff is appearing *pro se*. Thus, his complaint is more leniently construed and "held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citations and internal quotation marks omitted); *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998). However, nothing in that leniency excuses a plaintiff from compliance with threshold requirements of the Federal Rules of Civil Procedure. *See Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1998), *cert. denied*, 493 U.S. 863 (1989). Nor does this leniency require or allow courts "to rewrite an otherwise deficient pleading [by a *pro se* litigant] in order to sustain an action." *GJR Invs., Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1369 (11th Cir. 1998).

"The purpose of the preliminary injunction is to preserve the positions of the parties as best we can until a trial on the merits may be held." *Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011). It is an extraordinary remedy, so the moving party must meet a high standard to obtain such remedy. *Id.* In particular, the moving party must show that:

(1) [it has] a substantial likelihood of success on the merits;

(2) irreparable injury will be suffered unless the injunction issues;

(3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and

(4) if issued, the injunction would not be adverse to the public interest.

Id. at 1229 (quoting *Am. Civil Liberties Union of Fla., Inc. v. Miami–Dade Cnty. Sch. Bd.*, 557 F. 3d 1177, 1193–94 (11th Cir. 2009)). The Court may not grant a preliminary injunction "unless the movant clearly establishes the burden of persuasion as to the four requisites." *Am. Civil Liberties Union of Fla., Inc.*, 557 F. 3d at 1198. "Failure to show any of the four factors is fatal, and the most common failure is not showing a substantial likelihood of success on the merits." *Id.*

A. REVIEW OF PLAINTIFFS' CLAIMS

As an initial matter, the Court finds that Ashton Dingler, as an unborn child, lacks standing to sue in his own right. The Georgia Supreme Court has held that the live birth of an allegedly injured fetus is a necessary prerequisite to the maintenance of an action by the child as a victim of a tort. *Peters v. Hospital Authority of Elbert County*, 458 S.E.2d 628, 629 (Ga. 1995) (holding, in the context of a stillborn delivery, that the fetal victim of a tort must be born alive in order to seek recovery pursuant to O.C.G.A. § 51–1–9, and that such a requirement does not violate the equal protection clause because it is rationally related to the legitimate governmental purpose of creating a limitation on who is

entitled to bring a tort action). Accordingly, the Court **DISMISSES** the claims of Plaintiff Ashton Dingler.

1. Count A: Mandamus

In support of his claim for mandamus, Dingler asserts that Respondents have failed to carry out a clear and nondiscretionary duty to protect Dingler and his unborn child under the Sixth, Eighth, and Fourteenth Amendments of the Georgia and U.S. Constitution and O.C.G.A. § 19-7-5 (providing for mandatory reporting of child abuse or neglect). Dingler alleges that he has no adequate remedy at law due to the lack of authority of the trial court presiding over his case in family court to order the protection of his unborn child. He requests this Court grant mandamus relief requiring Respondents to "provide an effective remedy" to protect the child.

It is well established that mandamus is an extraordinary remedy, which is available only to correct a clear abuse of discretion or usurpation of judicial power. *In re Lopez-Lukis*, 113 F.3d 1187, 1187–88 (11th Cir. 1997). Plaintiff here has the burden of showing that his right to issuance of the writ of mandamus is "clear and indisputable." *Id.* (quoting *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 403 (1976)). The writ of mandamus is not to be used as a substitute for appeal, even though hardship may result from delay. *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964).

Dingler's vague request for writ of mandamus to "provide an effective remedy" is insufficient to state a claim for relief that is "clear and indisputable."

In re Lopez-Lukis, 113 F.3d 1187, 1187–88. Despite his allegation that the family court has refused to carry out its duty to take action, a review of the case docket of the Fulton Superior Court, Family Division shows that no action has yet been taken on either Plaintiffs' Petition for Legitimation or his Motion for Emergency Hearing, and a hearing in the case is scheduled for June 22, 2017. As such, Dingler has failed to state a claim for mandamus. Furthermore, as mandamus in federal court is not a substitute for appeal, in the event the family court denies the requested relief, Dingler's remedy is to appeal to the appropriate state appellate court. Accordingly, Plaintiffs' claim for mandamus is **DISMISSED**.

2. Count B: Declaratory Relief

Dingler's request for declaratory relief arises out of the family court's alleged failure to provide relief in connection with the action Dingler filed in that court. Federal district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282–83 (1995). The Supreme Court has cautioned that "[w]here another suit involving the same parties and presenting opportunity for [resolution] of the same state law issues is pending in state court, a district court might be indulging in '[g]ratuitous interference,' if it permitted the federal declaratory action to proceed." *Id.* (quoting *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494-95 (1942)). Where, as here, the family court has not yet spoken on the issue, this Court will exercise its discretion not to interfere with

ongoing parallel state litigation and will therefore **DISMISS** Plaintiffs' claim for declaratory relief.

3. Counts C, D, E, F & G: Denial of Guardian Ad Litem: Injunctive Relief

In support of his claim for preliminary and permanent injunctive relief, Dingler asserts that he is unable to assert timely paternal rights and act in furtherance of the interests/protection of his unborn child or request the appointment of a Guardian Ad Litem as a result of Respondents' "actions and inactions." He asks the Court to enjoin Respondents from violating his statutory and constitutional rights and to require Respondents to provide a Guardian Ad Litem to represent the interests of his unborn child. Dingler's claims for injunctive relief arising out the "denial of Guardian Ad Litem" suffer from the same defect as his prior claims for relief - he has not yet been denied the relief sought in the state court. *See Davis v. Self*, 547 Fed. Appx. 927, 930 (11th Cir. 2013) (father's claims for injunctive and declaratory relief were properly subject to dismissal under *Younger v. Harris*, 401 U.S. 37 (1971) where father had ongoing state court proceedings at time he filed his federal complaint and had failed to establish that he was procedurally barred from raising his constitutional claims in state court); *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003) ("A § 1983 claim alleging a denial of procedural due process requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process.");

Jimenez v. Wizel, 644 Fed. Appx. 868, 873 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 203 (2016) ("In the absence of additional, plausible, factual allegations tying a lack of process to the alleged deprivation of a constitutional right," father's complaint in child custody dispute failed to assert a due process claim against DFCS officials under under § 1983). Dingler has thus failed to satisfy his burden of demonstrating a substantial likelihood of success on the merits of his claims as necessary to satisfy the standard for establishing a denial of due process and for granting a preliminary injunction. Accordingly, the Court **DENIES** Plaintiff's request for preliminary injunction and **DISMISSES** Plaintiff's claims asserted in Counts C, D, E, F & G.[3]

This Court notes, however, that Dingler, as an unwed biological father has an "opportunity interest" in developing a relationship with his child that "begins at conception and may endure through the minority of the child," so long it is timely pursued and not abandoned. *Morris v. Morris*, 710 S.E.2d 601, 603 (Ga. Ct. App. 2011). This opportunity interest is one that "an unwed father has a right to pursue through his commitment to becoming a father in a true relational sense as well as in a biological sense." *Id.* "Factors which may support a finding of abandonment include, without limitation, a biological father's inaction during pregnancy and at birth, a delay in filing a legitimation petition, and a lack of contact with the child." *Id.* at 603-604. (finding father had not abandoned child where the evidence showed that beginning with conception, he provided medical

[3] As the Court has dismissed all substantive claims for relief, Plaintiff's ancillary claim for litigation expenses (including attorney's fees) is likewise **DISMISSED**.

insurance to the mother throughout the pregnancy, allowed the mother to live in his house during a portion of the pregnancy, attended at least one doctor's appointment during the pregnancy, visited the mother at the hospital the day after the birth, and sought to legitimate the child less than two months after the birth); *see also In re J.M.*, 657 S.E.2d 337 (Ga. Ct. App. 2008) (affirming juvenile court's finding that biological father abandoned his opportunity interest in developing relationship with child because of father's failure to take any steps to insure the safety of the child during pregnancy, failed to contact police, DFCS, or any other social services agency to report the expectant mother's drug abuse problem in effort to prevent harm to his unborn child, failed to offer prenatal support or other assistance to mother during pregnancy or following birth in an attempt to contribute to child's health and safety).

Dingler should not give up on his efforts to support and encourage the health and wellbeing of his child. If the family court denies his request for appointment of Guardian Ad Litem in the context of his legitimation petition, which may not be ripe because the child has not yet been born, he has available state remedies. Specifically, he may file an appeal in the state courts or pursue an action in the juvenile court for appointment of Guardian Ad Litem under the provisions cited in his Petition here.

III. CONCLUSION

For the foregoing reasons, Plaintiff's request for preliminary injunction is **DENIED** and this action is **DISMISSED** pursuant to 28 U.S.C. § 1915(e)(2).

IT IS SO ORDERED this 20th day of June, 2017.

Amy Totenberg
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOSEPH DINGLER, and ASHTON DINGLER on behalf of themselves and all persons similarly situated,	:	
Plaintiffs,	:	
v.	:	
THE STATE OF GEORGIA, GA. DIV. OF FAMILY & CHILDREN SERVICES, DIR. BOBBY CAGLE, DFCS, FULTON COUNTY, GEORGIA, FAMILY COURT, CLERK, CATHELENE TINA ROBINSON,	:	CIVIL ACTION NO. 1:17-cv-2194-AT
Defendants.	:	

ORDER

This matter is before the Court on Plaintiff, Joseph Dingler's Motion for Leave to Amend Original Filing and Motion for Reconsideration [Doc. 7], Motion for Emergency Preliminary Injunction and/or Protective Order [Doc. 8], and Motion for Appointment of Counsel, Guardian Ad Litem [Doc. 9]. After Plaintiff was granted *in forma pauperis* status under 28 U.S.C. § 1915, this Court performed the required frivolity screening resulting in the dismissal of Plaintiff's claims.[1]

[1] Plaintiff complains that the Court wrongly applied 28 U.S.C. § 1915 to his Complaint as he is not a prisoner. Although Congress used the word "prisoner" in the statute, the Eleventh Circuit has held that § 1915 applies to non-prisoner indigent litigants as well as prisoners. *See Martinez v. Kristi Kleaners, Inc.*, 364 F.3d 1305, 1306 n.1 (11th Cir. 2004); *see also Rivera v. Allin*, 144 F.3d 719, 722 (11th Cir. 1998); *Mitchell v. Farcass*, 112 F.3d 1483, 1491 n.1 (11th Cir. 1997).

Under Local Rule 7.2(E), "[m]otions for reconsideration shall not be filed as a matter of routine practice," but only when "absolutely necessary." LR. 7.2(E), NDGa; *Bryan v. Murphy,* 246 F. Supp. 2d 1256, 1258-59 (N.D. Ga. 2003); *Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs,* 916 F. Supp. 1557 (N.D. Ga. 1995) (O'Kelley, J.). Reconsideration should only be granted where there is: (1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact. *See Smith v. Ocwen Fin.*, 488 F. App'x 426, 428 (11th Cir. 2012); *Bryan v. Murphy*, 246 F. Supp. 2d 1256, 1258-59 (N.D. Ga. 2003); *Jersawitz v. People TV*, 71 F. Supp. 2d 1330 (N.D. Ga. 1999) (Moye, J.); *Paper Recycling, Inc. v. Amoco Oil Co.*, 856 F. Supp. 671, 678 (N.D. Ga. 1993) (Hall, J.).

Parties may not use a motion for reconsideration to show the court how it "could have done it better," to present the court with arguments already heard and dismissed, to repackage familiar arguments to test whether the court will change its mind, or to offer new legal theories or evidence that could have been presented in the original briefs. *Bryan v. Murphy*, 246 F. Supp. 2d at 1259; *Pres. Endangered Areas of Cobb's History, Inc.*, 916 F. Supp. at 1560; *Brogdon ex rel. Cline v. Nat'l Healthcare Corp.*, 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000) (Murphy, H.L., J.); *Adler v. Wallace Computer Servs., Inc.*, 202 F.R.D. 666, 675 (N.D. Ga. 2001) (Story, J.) (citing *O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992)). If a party presents a motion for reconsideration under any of these

circumstances, the motion must be denied. *Bryan v. Murphy*, 246 F. Supp. 2d at 1259; *Brogdon ex rel. Cline*, 103 F. Supp. 2d at 1338.

The Court has carefully reviewed the arguments for reconsideration raised by Plaintiff, thoroughly reviewed the previous Order the Court entered in this case, and finds that reconsideration is not warranted. Plaintiff has not shown that there is newly discovered evidence, any intervening development or change in controlling law, or a need to correct a clear error of law or fact. Plaintiff's arguments for reconsideration amount to a showing of how the Court "could have done it better" and a test to see if the Court will change its mind.

Thus, Plaintiff's Motion for Reconsideration [Doc. 7] is **DENIED** and Plaintiff's Motion for Leave to Amend Original Filing [Doc. 7], Motion for Emergency Preliminary Injunction and/or Protective Order [Doc. 8], and Motion for Appointment of Counsel, Guardian Ad Litem [Doc. 9] are **DENIED AS MOOT**.

IT IS SO ORDERED this 13th day of July, 2017.

Amy Totenberg
United States District Judge

Additional material from this filing is available in the Clerk's Office.

No. _____

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IN THE
SUPREME COURT FOR THE united states of America

Joseph Dingler - Sui Juris, et al
(We the People)
Petitioners

vs.

State of Georgia, et al
(Article III Courts, PLRA)

PROOF OF SERVICE RULE 29

I, Joseph Dingler, declare under penalty of perjury that I am indigent and have provided a Dept of Labor Wage earning report to confirm my lack of employment, lack of ability to overcome the substantial cost of litigating at this level and request of the Court, the clerk to waive this requirement of Petitioner.

I also declare due to application of the PLRA, there are no parties to be served in this miscarriage of Article III power. However, I have provided copies I obtained through the generosity of "self-help" legal clinic for the purpose of file stamping and forwarded to the Chief Justices of both the 11th Circuit of Appeal and the Northern District of Georgia-Atlanta, as they're the only adversarial parties currently in this litigation.

Executed on this the 19th day of September, 2018