

IN THE SUPREME COURT OF OHIO

ANDREA A. BARTH,	)	CASE NO. 06-896
	)	
Appellee,	)	On Appeal from the
vs.	)	Cuyahoga County 8 <sup>th</sup> District
	)	Court of Appeals Case No. 86473
JEFFREY BARTH,	)	
	)	
Appellant.	)	

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MERIT BRIEF OF GUARDIAN *AD LITEM*, JOHN J. READY

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DEBORAH AKERS-PERRY (0017997)

Attorney for Appellee

Wolf and Akers, L.P.A.

The East Ohio Building, Suite 1515

1717 East Ninth Street

(216) 623-9999

(216) 623-0629 (fax)

TIMOTHY J. FITZGERALD (0042734)

Attorney for Appellant

Gallagher Sharp

Bulkley Building-Sixth Floor

1501 Euclid Avenue

Cleveland, Ohio 44115

(216) 241-5310

(216) 241-1608 (fax)

JOHN J. READY (0040987)

Guardian Ad Litem and Counsel

for Alex and Sarah Barth

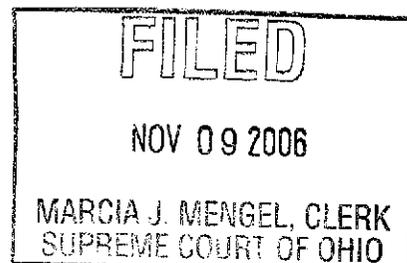
905-A Canterbury Road

Westlake, Ohio 44145

(440) 871-4000

(440) 871-3494 (fax)

jready@readylaw.com



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## STATEMENT OF THE CASE

The case currently pending commenced in August 2004. Appellant has contested the trial court's jurisdiction since that time, despite the lower court's denial of Appellant's motion to dismiss, the overruling of Appellant's objections to the Magistrate's Decision regarding the same, and the 8<sup>th</sup> District Court of Appeals affirmation of the trial court's decision.

Appellant has also filed motions to stay the proceedings of the lower court on at least three occasions. Appellant's objections were overruled. These actions have contributed to the prolonging of this divorce case over the past two years, thus detrimentally affecting the parties' minor children in the opinion of the Guardian *Ad Litem*.

Appellee and the children were only physically present in the state of California for approximately five weeks in July and August 2004 (Tr. at p. 91), during which time Appellant was largely outside the state on business trips in Europe and Canada (Tr. at p.92-93, 150-152, 184-185). After finding out about Appellant's purported extramarital indiscretions (including an ongoing affair in California), (Tr. at p.157) Appellee immediately (within hours) left the state. Within days, Appellant had returned to Ohio with the children and filed for divorce in the Cuyahoga Court of Common Pleas, Domestic Relations Division on August 24, 2004.

## LAW AND ARGUMENT

WHETHER THE SIXTH-MONTH RESIDENCY REQUIREMENT FOR JURISDICTION  
SET FORTH IN R.C. 3105.03 IS A STRICT TEST OR MAY A COURT EXAMINE ONE  
PARTY'S INTENT AND THE OTHER PARTY'S FRAUDULENT INDUCEMENT IN  
ABANDONING OHIO AS THEIR DOMICILE.

The sixth-month residency requirement is set in place to prevent parties from forum shopping among states for the most favorable jurisdiction to equitably or inequitably divide marital assets and allocate parental rights and responsibilities. The spirit of the jurisdiction

and venue rules will be completely frustrated if a party is able to fraudulently induce a spouse to go to another jurisdiction in order to take advantage of a more favorable situation in another state, as was the case in this matter.

Ironically, adopting a strict residency requirement test will undoubtedly create and encourage the very same forum shopping that RC §3105.03 seeks to prevent. In this matter, for example, the purpose of ORC §3105.03 was nearly frustrated when Appellant attempted to take advantage of being physically present part of the time in California by causing Appellee to leave the residence in Ohio in order to file for divorce in California.

It would be completely inequitable and contrary to the interest of justice to adopt a strict test in situations such as the one in the instant case. While the six-month residency requirement is necessary and ensures that the state has adequate contacts with the parties and the marital estate, there is clearly consideration to the facts when a spouse physically leaves Ohio under duress, coercion, fraud, or threat only to return after a brief stay in another jurisdiction. The trial courts are certainly in the best position to ascertain the intention of the parties regarding these moves, and the invocation of the jurisdiction of the various courts in relation to those moves.

The parties' subjective intention is already clearly contemplated in consideration of domicile which requires not merely physical presence, but an intention to remain. Village of Amelia v. Village of Bethel (Ohio 1956), 165 Ohio St. 115; Reese v. Reese (May 22, 1997), Cuyahoga App. No. 71336.

It is also hornbook law that one does not lose their Ohio domicile until they have acquired a new domicile. Village of Amelia v. Village of Bethel (Ohio 1956), 165 Ohio St. 115; Reese v. Reese (May 22, 1997), Cuyahoga App. No. 71336.

Appellee never lost her Ohio domicile because she did not “intend” to remain in California when she learned of Appellee’s affair. Her intent was manifested by her immediate return to Ohio and continuous domicile in Ohio ever since.

Taken to its logical conclusion, Appellant’s argument creates quite a conundrum for individuals who vacation or temporarily reside out-of-state for several months at a time, or who travel frequently for work or for extended periods of time. Appellant’s argument leads necessarily to the conclusion that individuals in these circumstances could be deprived of jurisdiction due to their absences from the state. Ironically, Appellant himself is at risk of being deprived of jurisdiction in California under his own argument and his heavy reliance upon Lewis v. Lewis (Mo. App. 1996), 930 S.W.2d 475.

Appellant travels frequently for his employment and, between February and June 2004, was traveling back and forth between California and Ohio to be with his family. He did not acquire his fixed California residence until June 28, 2004 (Tr. p. 80, 142). California’s residency requirement provides that one of the parties to the marriage must be a resident of the state of California for at least six months and of the county in which the proceeding is filed for three months. CAL. FAM. CODE § 2320. (Copy attached as Appendix A). If a fixed physical presence in the jurisdiction is absolutely necessary for the residency requirement to apply in a particular state, which Appellant maintains is true in the instant case, then Appellant himself would not likely meet California’s residency requirements! Under such circumstances, only Ohio would have been in position to exercise jurisdiction over the marriage or, more importantly, allocate parental rights and responsibilities.

A review of the pleadings reveals that Appellant considered himself a resident of Ohio for the six months preceding the filing of Appellee’s complaint, and Cuyahoga County for

ninety days immediately preceding the complaint. (Answer/Counterclaim p. 3. Supplement Volume I, P. 43). And while Appellee stated he was pleading in the alternative, there was no need to assert jurisdictional prerequisites on Appellant's behalf if Appellee resided in the jurisdiction with the minor children. Therefore, if Appellant was an Ohio resident, there is no question but that Ohio has jurisdiction over the parties' marriage and divorce.

Furthermore, in the Lewis case that Appellant relies on, the Missouri Court did engage in an intent analysis, based upon the evidence presented in that case, of whether or not a party intended to remain in one state over another. Contrary to Appellant's argument, the Lewis court did not adopt a strict residency requirement in determining which state had proper jurisdiction to divorce the parties and allocate parental rights and responsibilities. The court considered several facts specific to the case which demonstrated the intent of the party and that resulted in its ultimate finding that it lacked jurisdiction. These facts are easily distinguishable from the facts in the instant case; the most notable differences being that Appellee did not register to vote in California, did not actually vote in an election in California, did not acquire a California driver's license, and did not purchase a residence in California. Appellant's reliance on the Lewis case is misguided.

Ohio is the most appropriate jurisdiction due to the fact that all contacts and witnesses relating to the parties' marriage are located in Ohio. These contacts include the children's mother, schools, teachers, physicians, employers (except for Appellant's current employer, Sybron Dental Specialties, who have offices worldwide), records, and other lay witnesses. If Ohio were to cede jurisdiction to California (assuming that California would find that it had proper jurisdiction and venue based on Appellant's residence at a fixed address from and after June 28, 2004), it would be a great burden to gather the necessary facts and evidence, or

compel the appearance of witnesses located in Ohio. Appellee and the minor children have lived continuously in Ohio since this matter was filed in August 2004.

In addition, regardless of whether the sixth-month residency requirement is a strict test or one of intent, the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter “UCCJEA”) gave Ohio jurisdiction over the children and issues related to the allocation of parental rights and responsibilities in the instant case. RC §3127.15 states, in pertinent part, as follows:

(A) Except as otherwise provided in section 3127.18 of the Revised Code, a court of this state has jurisdiction to make an initial determination in a child custody proceeding only if one of the following applies:

(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.

(2) A court of another state does not have jurisdiction under division (A)(1) of this section or a court of the home state of the child has declined to exercise jurisdiction on the basis that this state is the more appropriate forum under section 3127.21 or 3127.22 of the Revised Code, or a similar statute of the other state, and both of the following are the case:

(a) The child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.

(b) Substantial evidence is available in this state concerning the child’s care, protection, training, and personal relationships.

\* \* \*

(C) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

In the instant case, California acknowledged the jurisdiction of Ohio. Ohio was, in fact, the children’s “home state” for purposes of ORC §3127.15(A)(1) and 3127.15(C).

Furthermore, the children and Appellee have all continuously resided in Ohio for over twelve

years. except for a period of approximately five (5) weeks in 2004 when they were in California. They have resided in Ohio continuously since August 2004.

The children and Appellee reside in Ohio. In September 2004, Appellant averred that he was an Ohio resident. (Answer p.3, ¶17, Supplement Volume I, p. 43). The children and Appellee's friends, physicians, dentists, coaches, schools, counselors, and other acquaintances are all located in Ohio, not California. The Appellant's former employers, physicians, doctors, friends and other acquaintances are located in Ohio as well. As the 8<sup>th</sup> District Court of Appeals noted, the children and Appellee's connections in Ohio are far more pervasive than those in California. As a result, Ohio had jurisdiction under the UCCJEA so long as Appellee and the children reside in Ohio pursuant to R.C. §3127.15, thus making it all the more logical for Ohio to be deemed the proper and appropriate jurisdiction to equitably divide the parties' marital assets and allocate parental rights and responsibilities in the parties' pending divorce proceeding.

California also enacted the UCCJEA California Family Code §3400, *et seq.* If the Appellant had taken the children to California, without Appellee's agreement to do so, on July 12, 2004, and thereafter filed for divorce and custody in California in August, 2004, the State of California would not be the home state of the minor children for purposes of conferring jurisdiction to allocate parental rights and responsibilities. CAL. FAM. CODE §3421 (Copy attached as Appendix B). Rather, Ohio would continue to be the home state for the purposes of allocating parental rights and responsibilities.

Analogously, Appellee did not consent that her minor children go to California for purposes of having the courts of that state decide their allocation of parental rights and responsibilities. Public policy militates against enabling Appellant achieving a result contrary

to the UCCJEA and/or laws designed to prevent forum shopping through fraud, subterfuge, artifice, chicanery, deceit, guile or misrepresentation.

This court must enable the trial courts to do what trial courts do, *ie*: examine the evidence and find facts, in order to conclude whether a party was induced to leave the state to deprive the state of jurisdiction, or forum shop in another jurisdiction. To rule otherwise exalts form over substance and invites harmful disruption in the lives of innocent children in furtherance of litigation scheming.

### CONCLUSION

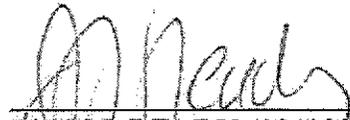
Ohio is, and always has been, the proper jurisdiction in the instant matter. Both parties resided in Ohio from 1994 until 2004. Appellant moved to California in February 2004 and acquired a fixed residence on June 28, 2004, but thereafter continuously traveled for business and traveled back and forth between California and Ohio to be with his family until mid August 2004. Appellee arrived in California in July 2004, and arrived in Ohio four or five weeks later, where she currently resides with the children. In September 2004, Appellant averred that he was a resident of the state of Ohio, and Cuyahoga County. All of the children's schools, teachers, physicians, friends, and records are located in Ohio.

Intent is a necessary element of the question of domicile. In the instant case, Appellee did not intend to remain in California when she learned of Appellant's indiscretions. She left California within hours and returned to her domicile in Ohio. Appellee remained an Ohio domiciliary because she never acquired a California domicile.

Appellant's continuous and unrelenting crusade to transfer the parties' divorce to California for adjudication has caused this case to remain pending for over two years. It was Appellant's conduct that enticed Appellee to leave Ohio in the first place; his argument that

Ohio does not have proper jurisdiction is yet another strategy to prolong the divorce proceedings and prejudice Appellee and their minor children.

Respectfully submitted,



JOHN J. READY (0040987)

*Guardian Ad Litem*

905-A Canterbury Road

Westlake, Ohio 44145

(440) 871-4000

(440) 871-3494 (fax)

jready@readylaw.com

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon counsel for Appellant, Timothy Fitzgerald, Gallagher Sharp, Bulkley Building, Sixth Floor, 1501 Euclid Avenue, Cleveland, Ohio 44115, and counsel for Appellee, Deborah Akers-Perry, Wolf and Akers, The East Ohio Building, Suite 1515, 1717 East Ninth Street, Cleveland, Ohio 44114, by regular U.S. mail, postage prepaid, this 8<sup>th</sup> day of November 2006.



John J. Ready (0040987)

*Guardian Ad Litem* and

Counsel for the minor children

# APPENDIX I

## FAMILY.CODE

### SECTION 2320-2322

2320. A judgment of dissolution of marriage may not be entered unless one of the parties to the marriage has been a resident of this state for six months and of the county in which the proceeding is filed for three months next preceding the filing of the petition.

2321. (a) In a proceeding for legal separation of the parties in which neither party, at the time the proceeding was commenced, has complied with the residence requirements of Section 2320, either party may, upon complying with the residence requirements, amend the party's petition or responsive pleading in the proceeding to request that a judgment of dissolution of the marriage be entered. The date of the filing of the amended petition or pleading shall be deemed to be the date of commencement of the proceeding for the dissolution of the marriage for the purposes only of the residence requirements of Section 2320.

(b) If the other party has appeared in the proceeding, notice of the amendment shall be given to the other party in the manner provided by rules adopted by the Judicial Council. If no appearance has been made by the other party in the proceeding, notice of the amendment may be given to the other party by mail to the last known address of the other party, or by personal service, if the intent of the party to so amend upon satisfaction of the residence requirements of Section 2320 is set forth in the initial petition or pleading in the manner provided by rules adopted by the Judicial Council.

2322. For the purpose of a proceeding for dissolution of marriage, the husband and wife each may have a separate domicile or residence depending upon proof of the fact and not upon legal presumptions.

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# APPENDIX II

## FAMILY.CODE

### SECTION 3421-3430

3421. (a) Except as otherwise provided in Section 3424, a court of this state has jurisdiction to make an initial child custody determination only if any of the following are true:

(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.

(2) A court of another state does not have jurisdiction under paragraph (1), or a court of the home state of the child has declined to exercise jurisdiction on the grounds that this state is the more appropriate forum under Section 3427 or 3428, and both of the following are true:

(A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.

(B) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

(3) All courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 3427 or 3428.

(4) No court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3).

(b) Subdivision (a) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

3422. (a) Except as otherwise provided in Section 3424, a court of this state that has made a child custody determination consistent with Section 3421 or 3423 has exclusive, continuing jurisdiction over the determination until either of the following occurs:

(1) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.

(2) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

(b) A court of this state that has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under Section 3421.

3423. Except as otherwise provided in Section 3424, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to