

IN THE SUPREME COURT OF OHIO

ANDREA A. BARTH,)
)
) Plaintiff-Appellee,)
)
) -vs-)
)
 JEFFREY BARTH,)
)
) Defendant-Appellant.)

CASE NO.: 2006-0896

UPON CONFLICT CERTIFIED
FROM THE COURT OF APPEALS,
EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY, OHIO,
CASE NO. CA-05-086473

MERIT BRIEF OF APPELLEE ANDREA A. BARTH

Attorney for Plaintiff-Appellee

Deborah Akers-Parry (0017997)
Wolf and Akers, LPA
1717 East Ninth Street, Suite 1515
Cleveland, Ohio 44114
(216) 623-9999
(216) 623-0629 (fax)

Attorney for Defendant-Appellant

Timothy J. Fitzgerald (0042734)
Gallagher Sharp
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, Ohio 44115-2108
(216) 241-5310
(216) 241-1608 (fax)

Guardian Ad Litem

John J. Ready (0040987)
John J. Ready & Associates
905-A Canterbury Road
Westlake, Ohio 44145
(440) 871-4000
(440) 871-3494 (fax)

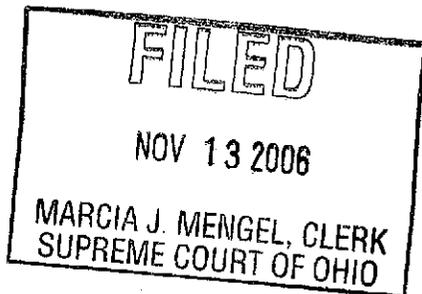


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STATEMENT OF FACTS

Although this Court is concerned only with application of the law, appellee must submit a statement of facts, because that of appellant is inaccurate. For a precise and authoritative statement of facts, this Court should look to the magistrate's decision that was adopted by the trial court by judgment entry filed on May 6, 2005 (attached to brief of appellant). It is this statement of the facts by which this Court should be bound in rendering judgment in this matter. On motion to certify to the Supreme Court for conflict, it is not the province of the court to usurp the function of the trier of fact by making a finding in favor of either party upon controverted questions of fact. *Smith v. Brane* (1945), 61 N.E.2d 908, at 909, 43 Ohio Law Abs. 52, 43 Ohio Law Abs. 232.

The parties, appellant Jeffrey Barth and appellee Andrea A. Barth, have been married since December 30, 1989 and are still married. Two children were born of the marriage, Sarah, born October 27, 1994 and Alexander, born October 14, 1996. The family moved to Ohio in 1994 and continuously resided together here until appellant husband took a job as in-house auditor for Sybron Dental Specialties in California on February 16, 2004. He was formerly employed by Ernst & Young in Cleveland. Appellee wife and the children remained in Ohio when husband moved to California in February of 2004. Husband fraudulently induced wife to leave her and the children's well-established contacts and stable lifestyle in Ohio because he planned to establish residence in California and file for divorce immediately thereafter. [Transcript of proceedings (hereafter "T.") 175-182, 194-202, 203-204, 210-229.]

At some point while in California without his family, husband met a woman by the name of Britain, who worked at a restaurant patronized by husband. During wife and children's only visit to California to see husband, this woman was present. She was introduced to wife as a

business associate of husband. He arranged for the woman, himself and the minor child Sarah to spend time together away from mother and the minor son Alex. (T. 182, 225-226.)

While husband was in California, plaintiff Andrea A. Barth took a leave of absence of one year from her job in pharmaceutical sales at Abbott Labs in February 2004. She arranged for the sale of the parties' Westlake, Ohio home, which wife and children vacated on June 20, 2004. At husband's urging, they then visited relatives in Atlanta and Florida before traveling to California to arrive on July 12, 2004. (T. 204-206.)

Husband was in Montreal, Paris, on the Riviera and in Holland for a period in excess of four of the weeks between July 12, the date of the family's arrival in California, and August 19, 2004, a pivotal day in this case. (T. 221-224.) Wife noted that husband's behavior was peculiar during the time they were in California after July 12, 2005. She later determined that he was plotting to establish his residence in California so that he could file for divorce against her immediately after she moved there. He delayed her arrival in California until most of his six months' residence requirement had elapsed, by having her travel in Florida with the children. After she arrived in California, husband traveled until the full six months had passed. During the few days that he was in Laguna Beach, he stayed out late, left very early in the morning and failed to eat dinner with the family, all contrary to habit. Wife concluded that husband knew that wife would discern that something was wrong if he were present the entire time. His plan did not work. Wife ultimately questioned husband's behavior in the early morning hours of August 19 and 20, 2004. (T. 221-229.)

Wife demanded to know what was happening and if husband's family was first priority for him. Husband stated that he is intimate with the woman named Britain and he has had two other affairs during the marriage. It was at that instant that appellee Andrea A. Barth informed her

husband she would return to Ohio, "where the children know everything," where their home has been "for their whole life." The next day, wife found a large folder of husband's papers relating to divorce. (T. 156-157, 210-212, 216-217.)

Having been in California for approximately five weeks, during most of which husband was absent, and having abruptly learned earlier that day of husband's intention to divorce her, wife took the children on August 20, 2004 to the airport to fly to her mother's home in Florida and plan her return to Ohio. Husband and his girlfriend accosted wife and children at the airport, husband having purchased tickets on wife's flight for himself and for his girlfriend. Husband threatened wife with arrest and demanded that wife and children leave with him. Wife sat in the back seat of husband's car to be with the children, while husband and the girlfriend sat in the front seat. Husband refused to take wife to her car, dropped her off at his rented home and left her without an automobile. He took his car and left with his girlfriend. Wife refused the girlfriend's attempts to enter the house. (T. 70-73, 231-238.)

The following day, August 21, 2004, wife was able to leave California with the help of her mother, who had flown to California to support her. (T. 65-66.) Wife attempted unsuccessfully to remove funds for her and the children's support. She was not employed at the time. (T. 77-78, 227.)

Although husband knew that his wife and children had left with the children's grandmother, he filed a missing person's report on August 22, 2004. (T. 130.) On August 23, 2004, wife informed husband by e-mail that the children were safe and with her. (T. 131.) That day, wife flew the children back home to Westlake, Ohio where the children were still enrolled in school. She later found out that husband called the school on August 23, 2004 and told the

principal to "unenroll" the children, forward their records to California and not to allow the children to attend without his consent. (T. 75-77.)

Most egregious is husband's fraudulent enticement of wife to California for the sole purpose of defeating her residence for divorce in Ohio. He established the six month residence necessary to file for divorce in California on August 16, 2004, three days before informing wife of his affair and only one month after moving wife and children from Ohio, where all of their school, church, social, medical and other contacts exist as a result of ten years of residence. (T. 194-199, 216.) The testimony cited above shows that husband purposefully induced wife to move to California, knowing that he would abandon her upon her arrival. She relied upon his representations in traveling there. Wife testified that she did not have "all of the information to make an informed decision about moving to California." (T. 207-209.) She stated that, had she known about the girlfriend, the folder with divorce papers, and husband's attitude toward her, she "would not have gotten on the plane" to California. (T. 218-219.)

Plaintiff Andrea A. Barth did not give up her domicile in Ohio and did not adopt a new domicile in California. Indeed, she could not have done so in the legal sense, because she did not have the knowledge necessary to formation of the requisite intent. She plans to stay in Ohio and has no specific intent to move from the state. (T. 217-218.) Wife filed for divorce in this case on August 24, 2004. On August 25, 2004 defendant husband filed an action for dissolution of marriage in the Superior Court of California, Orange County, under Case No. 04-D-007613. Plaintiff's exhibit 1. (T. 170.)

The magistrate's decision adopted by the judgment of the trial court filed on May 6, 2005 sets forth additional operative facts:

"On September 16, 2004 Defendant filed a Motion to Dismiss for Jurisdictional Reasons #189855 in the Cuyahoga County action. On September 21, 2004 a telephone conference was conducted between the courts, with counsel present, pursuant to the UCCJA. The courts jointly determined that the California matter would be stayed, pending the Ohio court's ruling on jurisdiction, and specifically Defendant's Motion to Dismiss. At page 2.

* * *

"Plaintiff testified that she first met a woman by the name of Britain when she was visiting California with the children during the Easter holidays. She was introduced to her by Defendant as a work colleague. Plaintiff later learned that Britain was a waitress who Defendant met in 2003. Plaintiff testified that during the six weeks that she and the children were in California, Britain was around the family an unusual amount of time. On August 19 Defendant delayed his arrival home from a business trip to pick up Britain from the airport. At page 3.

* * *

"Plaintiff testified that while she was being driven home from the airport, she discovered a portfolio in Defendant's car containing divorce planning pamphlets and completed spread sheets with headings such as "ex-spouse". The Magistrate takes notice that Defendant is a CPA and Certified Financial Planner. Defendant explained that he printed these documents off the internet sites visited by Plaintiff before he left for the airport. The Magistrate does not find this testimony to be credible. It is not conceivable that Defendant would take the time to review and print this information knowing that his family is at LAX getting on an airplane to Florida. At page 3.

* * *

“The Magistrate takes notice that Plaintiff and the children left California, literally, with the clothes on their back, and Defendant has provided no financial support for the family since they left California.

“Defendant believes that his wife acted wrongfully when she took the children and left California. He believes that she and the children should return to California and they should engage in family Christian based counseling. Plaintiff believes that she was induced by Defendant to give up her job, sell the marital home and move with the children to California under fraudulent and deceiving circumstances. She testified that she would not have ever left Westlake if she knew that Defendant had a paramour in California. At pages 3-4.

* * *

“The Magistrate finds Defendant’s allegation of misconduct by Plaintiff to be brazen and not founded in the facts of this case. At page 4.

* * *

“Plaintiff had testified that when she did discover these facts, she felt isolated and cut-off from family, friends and any other form of support network. The Magistrate takes notice that Plaintiff’s return to Cuyahoga County was immediate once these facts were discovered, with only a two day layover in Florida to make necessary arrangements. The Magistrate further takes notice that Defendant disclosed his extra-marital affair to Plaintiff on August 20th, after he had resided in California for six months and five days, having achieved residency status for the purpose of filing a Divorce on August 15th.

“The Magistrate finds that Plaintiff’s testimony, that she would not have surrendered her job, sold the marital home and moved her children to California had she known of her husband’s extra-marital affair, to be credible. The Magistrate finds that despite her traveling to California

and staying for forty days, Plaintiff could not have formulated the necessary intent to abandon her domicile in Ohio or to adopt a domicile in California because she did not have the prerequisite knowledge of the facts to formulate legitimate intent. The Magistrate further finds that Plaintiff's lack of knowledge arose directly from Defendant's failure to disclose compelling and necessary information relative to the change of residence.

"The Magistrate finds that Plaintiff did not knowingly abandon her residence in Ohio, and although she physically located herself in California for a period of time, she did not knowingly form the intent to remain there permanently or indefinitely, as is required to establish domicile. At page 5.

* * *

"The Magistrate finds that Ohio has been Plaintiff's residence for a period greater than six months as required by RC 3105.03." At page 5.

ARGUMENT

PROPOSITION OF LAW I

***McMaken v. McMaken* (1994), 96 Ohio App.3d 402,645 N.E.2d 113 and *Heath v. Heath* (March 7, 1997),6th Dist. No. L-96-288 are not in conflict with *Barth v.Barth*, 8th Dist. No. 86473, 2006-Ohio-1094.**

The authority for certification due to conflict is found in Section 3(B)(4), Article IV, Ohio Constitution.

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

". . .[A]t least three conditions must be met before *and during the certification of a case* to the Supreme Court of Ohio." Emphasis added.

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be “upon the same question.” Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Whitelock v. Gilbane Building Company, 66 Ohio St.3d 594, at 596, 1993-Ohio-223, 613 N.E.2d 1032, at 1034. The language “and during certification” apparently refers to the time during the pendency, argument and decision of the case. Therefore, although this Court has issued an order to the effect that a conflict exists, appellee urges against that conclusion herein. In the alternative, appellee requests that this proposition be treated as a motion for reconsideration of the entry providing that a conflict exists.

The decision in the instant appeal, *Barth v. Barth*, 8th Dist. No. 86473, 2006-Ohio-1094, and the two cases cited as conflicting, *Heath v. Heath* (March 7, 1997), 6th Dist. No. L-96-288 and *McMaken v. McMaken* (1994), 96 Ohio App.3d 402, 645 N.E.2d 113, do not differ in the rule of law applied. Although *Heath* and *McMaken* reach a different result from *Barth*, the only distinction among the three cases is a factual distinction. The weight of the evidence is not a valid predicate for an order of certification. *Shaffer v. S.S. Kresge Co.* (May 11, 1937), 2nd Dist. No. 2700, at page 2.

Heath and *McMaken* are not in conflict with *Barth* as to the issues set forth in the question certified by the 8th Appellate District, which is as follows:

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.

Where the rule of law in the case that is certified is the same as the rule applied in the case that is cited as in conflict, there is no conflict, and certification is improper. *Taylor v. Brocker* (1997), 117 Ohio App.3d 174, at 177, 690 N.E.2d 63, at 65. This is true here.

The rules of law applied in all three cases interpret R.C. 3105.03, which states:

The plaintiff in actions for divorce and annulment shall have been a *resident* of the state at least six months immediately before filing the complaint. Actions for divorce and annulment shall be brought in the proper county for commencement of action pursuant to the Rules of Civil Procedure. The court of common pleas shall hear and determine the case, whether the marriage took place, or the cause of divorce or annulment occurred, within or without the state.

Emphasis added.

The three courts of appeals apply the same rule of law that defines residence for purposes of R.C. 3105.03, each citing *Hager v. Hager* (1992), 79 Ohio App.3d 239, at 244, 607 N.E.2d 63, at 66:

The word 'residence' in R.C. 3105.03 means 'domiciliary residence,' a concept which has two components: (1) an actual residence in the jurisdiction, and (2) an intention to make the state of jurisdiction a permanent home. *Coleman v. Coleman* (1972), 32 Ohio St.2d 155 at 162, 61 O.O.2d 406 at 409, 291 N.E.2d 530 at 535; *Spires v. Spires* (1966), 7 Ohio Misc. 197, 35 O.O.2d 289, 214 N.E.2d 691.

The *Heath* and *McMaken* courts likewise apply the principle expressed in *Polakova v. Polak* (1995), 107 Ohio App.3d 745, 669 N.E.2d 498, which is cited in *Barth*:

A plaintiff's domicile in a divorce action is a question of intent and the plaintiff's representation will be accepted unless facts and circumstances establish that the plaintiff's claimed intent cannot be

accepted as true. *Winnard v. Winnard* (1939), 62 Ohio App. 351, 16 O.O. 51, 23 N.E.2d 977.

Ohio App.3d at 748, N.E.2d at 499. *McMaken* also relies upon this principle, citing *Hager*, supra, in support:

...[A]n intention to make a permanent home is known only by the individual concerned and is, therefore, largely a subjective determination. *Coleman v. Coleman*, supra. *Id.*, [*Hager v. Hager* (1992)] 79 Ohio App.3d at 244, 607 N.E.2d at 66-67.

96 Ohio App.3d at 405, 645 N.E.2d at 115. In turn, *Heath* cites *McMaken* for the proposition that a party's allegation of residence is presumed true unless a preponderance of the evidence shows otherwise. At pages 1-2.

Therefore, all three of the cases involved in the certification issue before this Court apply the same rules of law. Where a court does not rely for its judgment upon a proposition counter to that established in the allegedly conflicting case, there is not a conflict that warrants certification. *Terrell v. Wardlaw* (1944), 59 N.E.2d 64. This prerequisite for conflict certification is fundamental. The court in *Resolution Trust Corporation v. GSW Associates* (1992), 82 Ohio App.3d 75, 611 N.E. 2d 447 reiterated this tenet of law 48 years after *Terrell*, restating its holding of 53 years earlier.

This court has previously held that certification under the Constitution will be granted only where the judgment conflicts on the same question. *Johnson v. Indus. Comm.* (1939), 61 Ohio App. 535, 15 O.O. 345, 22 N.E.2d 921.

Ohio App.3d at 77, N.E.2d at 447.

The clear distinction among the three cases is their facts. However, “[f]actual distinctions between cases do not serve as a basis for conflict certification. This is so even though we may not agree with the ultimate judgment of a Court of Appeals on the facts before it.” *Whitelock v. Gilbane Building Company*, supra, 66 Ohio St.3d 594, at 599, 1993-Ohio-223, 613 N.E.2d 1032,

at 1035. In *McMaken* and *Heath*, the Courts of Appeals use nearly identical language to express that the evidence in each does not support a finding that the party asserting jurisdiction in Ohio actually intended to make Ohio her domiciliary residence.

Appellant's actions arguably belie her stated intent to make Ohio her permanent home. The trier of fact resolved the conflict by concluding that appellant did not demonstrate intent to permanently settle here, resulting in a failure to establish residence.

Heath at page 2. Emphasis added. The *McMaken* court found as follows:

Theresa's testimony that she did not intend to remove her legal residence from Ohio when she went to live in Texas is probative of her subjective intent, which is known only to her. However, *her expression of that intent is belied by her other testimony.* The trial court is not bound by her statement of intent when the objective facts contradict it.

96 Ohio App.3d at 405, 645 N.E.2d at 115. Emphasis added.

In direct contrast, the court in *Barth* found that the testimony of appellee was credible with regard to her intent to maintain Ohio as her domicile. The court in *Barth* entered a factual finding, affirmed by the court of appeals, that appellee did not abandon Ohio as her domicile when she temporarily went to California. The trial court found that:

Ohio has been Plaintiff's residence for a period greater than six months as required by RC 3105.03.

At page 5 of magistrate's decision adopted by the trial court by judgment entry filed on May 6, 2005. The Court of Appeals affirmed, stating:

"[T]he record demonstrates that before the appellant moved to California, the family had lived together in Ohio for approximately ten years.

At ¶ 24.

Appellee did not possess full knowledge of the circumstances and, as a result, did not voluntarily change her domicile as far as the requirements of R.C. 3105.03 are concerned. After evaluating the

substantial and detailed evidence in the record, we find no error on the part of the trial court.

At {¶29}.

Nor are the cases in conflict with each other as to the other issues set forth in the question certified by the 8th District. Fraudulent intent was not alleged in *Heath*. Therefore, *Heath* could not be in conflict with *Barth* on that issue.

One of several factors considered by the court in *McMaken* was wife's testimony that husband "had urged her to leave Ohio, promising to join her later in Texas." The court found that this testimony, juxtaposed against her testimony that "[w]hen she departed Ohio it was her intention to not return, but to remain in Texas or somewhere else south" did not support her claim that she did not intend to remove her legal residence from Ohio when she went to live in Texas.

Theresa's testimony that she did not intend to remove her legal residence from Ohio when she went to live in Texas is probative of her subjective intent, which is known only to her. However, her expression of that intent is belied by her other testimony. The trial court is not bound by her statement of intent when the objective facts contradict it.

96 Ohio App.3d at 405, 645 N.E.2d at 115. The determination of whether the evidence supported or belied McMaken's intent is a factual issue, not a matter of law.

The lower court in *Barth* entered factual findings that appellee Andrea A. Barth's testimony supported her stated intent to retain Ohio as her domicile, not to abandon it and not to adopt California as her domicile. At page 5 of magistrate's decision adopted by the trial court by judgment entry filed on May 6, 2005. On the issue of fraudulent inducement, there is no conflict between *McMaken* and *Barth*. There are only different factual findings, leading to opposite conclusions based upon application of the identical principles of law.

Even if this Court does not agree with the decision in *Barth*, if there is no conflict of law, the certification proceeding must be dismissed. “Factual distinctions between cases do not serve as a basis for conflict certification. This is so even though we may not agree with the ultimate judgment of a Court of Appeals on the facts before it.” *Whitelock v. Gilbane*, supra, 66 Ohio St.3d 594, at 599, 1993-Ohio-223, 613 N.E.2d 1032, at 1035.

In *Heath*, at page 1, appellant suggests “that the mandating of an absolute six month period of living in the state before filing is an erroneous interpretation of the statute . . . that appellant fully satisfied the statute by residing in Ohio from December 1994 until July 1995.” Appellant left Ohio to live in Michigan from July, 1995 to November 2, 1995. She returned to Ohio two months before filing for divorce here. The court found that she had not established the requisite residence to confer jurisdiction in Ohio. At page 2. There was no allegation of fraudulent inducement, trickery or promises not kept. Such an issue was not raised and therefore *Heath* cannot be in conflict with *Barth*.

As argued above, there surely can be no dispute that all three cases cited in the order of certification “examined one party’s intent,” a question posed in the issue upon certification. Therefore, there is no conflict as to the issue of intent or the issue of fraudulent inducement.

Based upon the foregoing, appellee Andrea A. Barth requests that the certification for conflict be dismissed.

PROPOSITION OF LAW II

After determination of domicile in accord with law, the six-month residence requirement for jurisdiction set forth in R.C. 3105.03 is to be strictly applied.

By arguing the question posed on certification, appellee does not abandon her position that there is no conflict among the three cases cited in the certification order.

As discussed above, “residence” for purposes of R.C. 3105.03 is domiciliary residence. *Hager*, supra, 79 Ohio App.3d, at 244, 607 N.E.2d, at 66. Unless this Court alters the legal definition of “domicile” or the legal definition of “intent” and reverses decades of legal precedent defining those terms of art, this Court must resolve conflict, if any, in favor of the holding in *Barth*.

A. Domicile is requisite to jurisdiction.

As set forth above, the residency requirement for jurisdiction to attach in a divorce action in Ohio is set forth in R.C. 3105.03. "The word 'residence' in R.C. 3105.03 means 'domiciliary residence,' a concept which has two components: (1) an actual residence in the jurisdiction, and (2) an intention to make the state of jurisdiction a permanent home. [Citations omitted.]" *Hager*, supra, 79 Ohio App.3d, at 244, 607 N.E.2d, at 66.

Residence for purposes of this statute could not require ownership or even a rental interest in a home because this interpretation would exclude the homeless from any right to a divorce in Ohio. Persons rooming with an owner or renter of property would likewise be prohibited.

B. Domicile is determined by the intent of the party; intent cannot be formulated without knowledge.

The court in *Polakova v. Polak*, supra, explained how a person changes domicile for purposes of R.C. 3105.03:

A person effectively changes her domicile when she actually abandons the first domicile, coupled with the intention not to return to it, and acquires a new domicile.

107 Ohio App.3d, at 748, 669 N.E.2d, at 499. The intent of appellee wife is the key to the

determination of her domicile for purposes of determining this Court's jurisdiction. As held in *Polakova v. Polak*, supra:

A plaintiff's domicile in a divorce action is a question of intent and the plaintiff's representation will be accepted unless facts and circumstances establish that the plaintiff's claimed intent cannot be accepted as true. *Winnard v. Winnard* (1939), 62 Ohio App. 351, 16 O.O. 51, 23 N.E.2d 977.

107 Ohio App.3d, at 748, 669 N.E.2d, at 499. Also, *Smerda v. Smerda* (1947), 48 Ohio Law Abs.

232. *Black's Law Dictionary*, Fifth Edition, page 727, defines "intent" as follows:

Design, resolve, or determination with which person acts. *Witters v. United States*, 70 U.S.App. D.C. 316, 106 F.2d 837, 840. Being a state of mind, is rarely susceptible of direct proof, but must ordinarily be inferred from the facts. **It presupposes knowledge.** *Reinhard v. Lawrence Warehouse Co.*, 41 Cal. App.2d 741, 107 P.2d 501, 504. A mental attitude which can seldom be proved by direct evidence, but must ordinarily be proved by circumstances from which it may be inferred. *State v. Gantt*, 26 N.C. App. 554, 217 S.E.2d 3, 5. . .

Emphasis added. The court in *Levin v. Nielsen* (1973), 37 Ohio App.2d 29, 306 N.E.2d 173 held that knowledge is prerequisite to the formation of intent:

Absent wrongful **intent (which would presuppose knowledge Mrs. Levin did not have)**, she cannot be said to have herself aided or abetted, or conspired, and therefore to have committed as a principal an act which the General Assembly has clearly not meant to make wrongful as to her.

Emphasis added. Ohio App.2d, at 66, N.E.2d, at 185, footnote 12.

Thus, it is clear that, notwithstanding her traveling to California and staying for five weeks, looking for a job, connecting utilities, attending church and making a doctor's appointment, appellee Andrea A. Barth could not have formulated the necessary intent to abandon her domicile in Ohio or to adopt a domicile in California because she did not have the prerequisite knowledge of the facts to formulate legitimate intent.

C. Appellee could not have abandoned her domicile in Ohio unless she had first acquired a new domicile.

The court held in *City of East Cleveland v. Landingham* (1994), 97 Ohio App.3d 385, 646

N.E.2d 897 as follows:

We have stated above that every person must have a domicile somewhere. *Sturgeon v. Korte, supra*. It is also a well-established rule of law that **no one loses his old domicile until a new one is acquired.** *Saalfeld v. Saalfeld* (1949), 86 Ohio App. 225, 41 O.O. 94, 89 N.E.2d 165; *Larrick v. Walters* (1930), 39 Ohio App. 363, 177 N.E. 642; *Bd. of Edn. of Oakwood City School Dist. v. Dille* (1959), 109 Ohio App. 344, 11 O.O.2d 139, 165 N.E.2d 807; *Cunningham v. Bessemer Trust Co.* (1931), 39 Ohio App. 535, 178 N.E. 217; *Spires v. Spires* (1966), 7 Ohio Misc. 197, 200-202, 35 O.O.2d 289, 292, 214 N.E.2d 691, 693-695. Thus, abandonment of one's domicile is effected only when a person chooses a new domicile, establishes actual residence in the place chosen and shows a clear intent that it be the principal and permanent residence.

* * *

While the law remains that a person retains the old domicile until a new one is shown to be acquired by the concurrence of fact and intent, **no one acquires a new domicile or loses the old one by the mere fact that he intends to move elsewhere and prepares to do so or that he is physically in a new location without any intent to remain there.** *In re Estate of Huston* (1956), 165 Ohio St. 115, 59 O.O. 130, 133 N.E.2d 347.

Emphasis added. Ohio App.3d, at 390, N.E.2d, at 900. Appellee wife was physically in a new location, California, for a period of weeks, but clearly had no intent to stay. She could not have abandoned her former domicile, Ohio, without the clear intent that California be her principal and permanent residence.

Intent is a subjective fact seldom susceptible of proof by direct evidence. Ordinarily it must be ascertained by a consideration of the objective facts and the inferences fairly to be drawn therefrom.

Serrer v. Cigarette Service Co. (1946), 74 N.E.2d 841, at 844; 35 O.O. 260. It is logical to draw

only one conclusion: that, had appellee known that she faced a mistress and a divorce in a totally foreign state, 3,000 miles from home, appellee would have formed the intent to remain in Ohio.

D. The acts based upon which domicile is determined must be voluntary. A voluntary act must be predicated upon full knowledge of the circumstances and consequences.

To result in a change in domicile for purposes of R.C. 3105.03, a new residence must be voluntarily acquired. As set forth in *State ex rel. Saunders v. Court of Common Pleas of Allen County* (1987), 34 Ohio St.3d 15, at 16, 516 N.E.2d 232, at 233:

In *Murray v. Remus* (App. 1925), 4 Ohio Law Abs. 7, motion to certify overruled (1925), 3 Ohio Law Abs. 690, 691, the Court of Appeals for Hamilton County held:

"4. 'Residence in a place, to produce a change of domicile, must be voluntary. If therefore it be by constraint or involuntary, as arrest, imprisonment, etc., the antecedent domicile of the party remains.' "

Emphasis added. *Black's Law Dictionary*, Fifth Edition, page 1413, defines "voluntary" as follows:

Unconstrained by interference; unimpelled by another's influence; spontaneous; acting of one-self. *Coker v. State*, 199 Ga. 20, 33 S.E.2d 171, 174. Done by design or intention. Proceeding from free and unrestrained will of the person. Produced in or by an act of choice. Resulting from free choice. The word, especially in statutes, often implies **knowledge of essential facts**. . .

Emphasis added. The definition of "voluntary" is also found in case law under other facts, for example:

As the Supreme Court noted in *Moran v. Burbine* (1986), 475 U.S. 412, 421, a defendant may waive his Miranda rights provided the waiver is made knowingly, voluntarily and intelligently. In that regard, voluntary means "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* Moreover, the waiver must be made "**with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.**" Once it is determined that defendant " * * * [a]t all times knew he could stand

mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, * * * the waiver is valid as a matter of law. * * * ." [citation omitted.]

Emphasis added. *State v. Asworth* (April 11, 1991), 10th Dist. No. 90AP-916, at page 4. Other examples taken from the dissenting opinion in *Hughes v. Hughes* (1988), 35 Ohio St.3d 165, 518 N.E.2d 1213 concern voluntary waiver:

People's Bank v. Pioneer Food Indus., Inc. (1972), 253 Ark. 277, 282, 486 S.W.2d 24, 28 ("waiver" is a voluntary relinquishment of a **known** right); * * * *Garden City Production Credit Assn. v. Lannan* (1971), 186 Neb. 668, 676, 186 N.W.2d 99, 106 ("waiver" is a voluntary abandonment or surrender, by a capable person, of a right **known by him** to exist, with the intention that such right shall be surrendered), overruled on other grounds in *Farmers State Bank v. Farmland Foods, Inc.* (1987), 225 Neb. 1, 10, 402 N.W.2d 277, 282; * * * *Gorge Lumber Co. v. Brazier Lumber Co.* (1972), 6 Wash.App. 327, 336, 493 P.2d 782, 788 ("[a] waiver is the intentional and voluntary relinquishment of a **known** right"). . .

Emphasis added. Ohio App.3d, at 169, N.E.2d, at 1217, at footnote 6.

Thus, full knowledge of the facts underlying the choice to change domicile is necessary to a voluntary choice. Appellee wife lacked that knowledge. Without voluntary choice there can be no change of domicile.

The *Saunders* court, *supra*, quoted *Sturgeon v. Korte* (1878), 34 Ohio St. 525 at page 535, as follows:

"A person under confinement for crime can not adopt a new residence until discharged from imprisonment. Such disability is said to arise from the general principle that a person under the power and authority of another possesses no right, or is incapacitated, to choose a residence."

Similarly, appellee, who had knowledge inferior to appellant husband, was under appellant's power and was incapacitated to choose a residence or form the intent to do so. Certainly had appellant husband informed appellee that he had a girlfriend with whom he had been intimate; that

he intended to file for divorce, appellee would not have chosen to travel with the children to California and leave their established lifestyle and contacts in Ohio. Appellee's trip to California was not voluntary and, by law, cannot constitute a change of domicile.

E. Fraud on the part of appellant induced appellee wife to travel to California.

Appellee's lack of knowledge arose from the fraud perpetrated upon her by appellant husband. His behavior comported exactly with the elements necessary to establish fraud. It was his fraudulent inducement of appellee to travel to California with the children that caused her to do so; it was not her fully informed intent to do so. The elements of fraud are set forth in *In re Adoption Of Murphy* (1988), 53 Ohio App.3d 14, at 18, 557 N.E.2d 827, at 831, quoting *Friedland v. Lipman* (1980), 68 Ohio App.2d 255, 429 N.E.2d 456:

"(a) a representation or, where there is a duty to disclose, concealment of a fact,

"(b) which is material to the transaction at hand,

"(c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,

"(d) with the intent of misleading another into relying upon it,

"(e) justifiable reliance upon the representation or concealment, and

"(f) a resulting injury proximately caused by the reliance."

Appellant concealed his affair and his intent to obtain a divorce. As her husband, appellant owed appellee a fiduciary duty. His concealment was material to the issue of whether appellee was able to form actual and legitimate intent to change her residence from Ohio to California. His concealment was committed with his knowledge of its falseness and with the intent of misleading appellee into relying upon his representations and omissions and traveling with the children to California. Appellee justifiably relied upon appellant's concealment of the truth. Her struggle in

these costly and emotionally damaging jurisdictional proceedings was directly caused by her reliance on appellant's fraudulent acts.

F. Where, as here, fraud is committed specifically to defeat or create jurisdiction, the resulting jurisdiction should be disallowed.

Appellant's fraud was not failure to keep a promise of future performance. It was pre-calculated meticulous deception designed to defeat jurisdiction in Ohio and create jurisdiction in California. Where the fraud perpetrated upon a spouse goes directly to the creation or interference with jurisdiction, the court should not condone the fraud. The assertion of jurisdiction by appellant in California and the opposition to jurisdiction in Ohio should be soundly denied by the courts of both venues.

G. Appellant's position that a strict test should be applied in determining domicile is untenable.

Barth, McMaken and *Heath* each address the issue of residence under R.C. 3105.03 by first determining domicile and then employing a strict test as to the six-month element of R.C. 3105.03. *Barth, McMaken* and *Heath* do not exclude the evidence, but consider the evidence of intent in detail and rule specifically upon the intent of the party asserting jurisdiction in Ohio.

The determination of domicile is the province of the trier of fact according to *Heath*. It involves the exercise of discretion, contrary to appellant's position. The following description of residence under R.C. 3105.03 can hardly be labeled a "strict test."

The word "resident," as used in R.C. 3105.03, is used in the popular sense. . ."

* * *

When a complaint for a divorce is filed the plaintiff's allegation of residency is presumed true. *McMaken v. McMaken* (1994), 96 Ohio App.3d 402, 405, citing *Sturgeon v. Korte* (1878), 34 Ohio St. 525. When challenged, however, it is the plaintiff's burden to show that he or she is domiciled within the state. The measure of proof

necessary is by a preponderance of the evidence. *Id.* The trier of fact is the sole judge of the credibility of the witnesses on this issue and a reviewing court cannot invade the province of the trier of fact on review.

At pages 1-2. Likewise, in *McMaken*, the determination of domicile is treated as a question of fact, which is subject to the discretion of the court:

The fact of residence in a location is prima facie evidence of domicile there, but is rebuttable by proof to the contrary. 36 Ohio Jurisprudence 3d (1982), Domicile, Section 19. However, an intention to make a permanent home is known only by the individual concerned and is, therefore, largely a subjective determination. *Coleman v. Coleman, supra.* *Id.*, 79 Ohio App.3d at 244, 607 N.E.2d at 66-67.

96 Ohio App.3d, at 405, 645 N.E.2d, at 115.

The decision regarding domicile is likewise deemed a matter for the trier of fact in *Drazen v. Drazen* (May 8, 1981), 3rd Dist. No. 9-80-44:

Since domicile is dependent upon presence and intention as shown by the facts and circumstances disclosed by the evidence, the decision in each case will depend largely upon its own particular facts.

At page 2.

Appellant, at pages 20 through 23 of his brief, discusses *Lewis v. Lewis* (Mo. App. 1996), 930 S.W.2d 475. The court in *Lewis* heard evidence on fraudulent inducement and ruled upon whether wife had been “hoodwinked” into moving to Colorado.

The record does not support wife's first contention that husband “hoodwinked” her into moving to Colorado by making false promises regarding the extent of his business travel. There was no indication that her move to Colorado was contingent upon husband's compliance with predetermined criteria regarding the amount of business travel he would do. In addition, husband did not fraudulently induce wife to move with misrepresentations of existing fact about the frequency of his business travel. Husband's statements of his opinions, expectations, and predictions for future

business travel did not constitute fraudulent misrepresentations. See *Arnott v. Kruse*, 730 S.W.2d 597, 600 (Mo.App.1987).

At page 478. Here, the court did not exclude, but considered the evidence of fraudulent inducement in detail and ruled specifically thereon. Clearly, Missouri deems fraudulent inducement relevant for purposes of determining intent and, in turn, determining domicile.

Similarly, in *McMaken*, the party asserting jurisdiction testified that her husband had urged her to leave Ohio, promising to join her later in Texas, which constitutes a claim of fraudulent inducement similar to that of appellee in *Barth*. However, in *McMaken*, the party remained in Texas for three years, and, impliedly, her husband never joined her. The court in *McMaken* found that there was no fraud under these facts. The court did not exclude, but considered the evidence of fraudulent inducement and ruled that the evidence did not support the claim; wife intended to make Texas her home.

Appellant cites *Ford v. Industrial Commission* (1945), 145 Ohio 1, 60 N.E.2d 471 for the proposition that subject matter jurisdiction is not subject to estoppel. Brief of appellant, pages 18 through 20. There is no claim of estoppel in any of the cases which are the subject of this certification. Appellant argues that appellee asserts fraudulent inducement "as an exception to a strict residency requirement," as Mr. Ford asserted estoppel. Brief of appellant, page 18.

Appellant's attempt to analogize *Ford* to *Barth* is faulty. Appellee in *Barth* asserts fraudulent inducement because it directly negates the intent that is a mandatory element of domicile, not because appellant's actions estop him from prevailing. *Ford* is not on point.

Appellant further cites *Williams v. North Carolina* (1945), 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577. *Williams* expresses that:

Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance.

* * *

Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society.

U.S., at 229-230. Appellant discusses *Coleman v. Coleman* (1972), 32 Ohio St.2d 155 in the same context as *Williams*, naming six reasons for Ohio's residency requirement in divorce actions:

(1) A deterrent to those with marital problems from entering the state, (2) a positive reinforcement to reconciliation and maintenance of marital stability, (3) an assurance of domicile and residence, (4) a protection of the state's reputation, (5) a guarantee for the welfare of the children, and (6) an interest in assuring that its decrees and judgments would stand up in foreign courts on collateral attack.

Relative to *Williams* and *Coleman*, appellee Andrea A. Barth clearly established a nexus with Ohio more permanent than elsewhere. As set forth in the magistrate's findings of fact, all of appellee's legal relations and responsibilities of the utmost significance are bound to Ohio, not California. Her deeply significant personal rights are at issue and, unarguably, better protected in Ohio than California, given the facts of this case. It would be contrary to the basic interests of society if, according to the binding factual findings of the trial court, appellant and others like him were to manipulate and degrade with impunity their respective spouse's lives and the spirit of the residency statutes.

If, as held in the lower courts, appellee did not form the requisite intent to abandon Ohio or adopt California as her domicile, such that jurisdiction over the parties' divorce is properly in Ohio, none of the six purposes for Ohio's residency requirement set forth in *Coleman* would be defeated. Appellant has not specified anything to the contrary.

The negation of appellee's intent by her justifiable reliance upon appellant's fraud is not an "undefinable concept," as argued by appellant. Indeed, many aspects of the law deal in the

concept of fraud, which is readily susceptible of definition and application. *In re Adoption Of Murphy*, supra. “Subjective considerations” are the cornerstone of legal intent, although trivialized by appellant. Brief of appellant, page 17.

Appellant argues that jurisdiction cannot be waived or conferred by agreement. Brief of appellant, page 18. The determination of domicile for purposes of subject matter jurisdiction in this case involves no waiver of jurisdiction or conferral of jurisdiction by agreement.

Appellant asserts that intent to relinquish residence is determined at the time of a move from the jurisdiction and that it is not nullified by events which later alter intent. Brief of appellant, page 23. The actual legal intent of appellee Andrea A. Barth never came into being and therefore could not be altered. Appellant’s theory does not apply.

Appellant further argues that, “If the Eighth Appellate District’s decision is allowed to stand, any spouse who relocates to a different state with the expectation that the marriage will survive will be able to avoid R.C. 3105.03 by arguing that he or she was misled and induced to leave Ohio by unfulfilled promises by the other spouse.” Brief of appellant, page 24. If a spouse demonstrates that he or she was defrauded into relocating, that factual finding should impact the determination of residence. Moreover, in a case such as *Barth*, where the facts so definitely demonstrate appellant’s calculated fraud **for the sole specific purpose of establishing jurisdiction in a state other than Ohio**, the interests of justice and the purposes of jurisdictional statutes in both Ohio and California are better served by an adjudication that appellee could not have formed the requisite intent to abandon her domicile in Ohio.

Appellant asserts that the statutory requirements of R.C. 3105.03 are “impervious to judicial discretion.” Brief of appellant, page 25. The requirement that a plaintiff be domiciled in Ohio for six months immediately preceding the filing of a divorce complaint is not subject to

discretion; however, the determination of the place of domicile is subject to the court's discretion, as it has been for decades throughout the development of precedent governing the issue. *Winnard v. Winnard* (1939), 62 Ohio App. 351, 16 O.O. 51, 23 N.E.2d 977.

H. After fair and just adjudication of the issue of domicile, the six-month element of R.C. 3105.03 should be strictly applied.

There is little precedent contrary to the principle that the durational element of R.C. 3105.03 is a strict legal requirement and must be applied without variation.¹ Precedent rarely shortens or lengthens that time for equitable or other reasons. Application of the durational component of R.C. 3105.03 in a strict fashion, after determination of domicile according to the principles of law set out above, satisfies the purposes of statutory residence requirements set out in brief of appellant at pages 12 through 14. Determination of domicile on a strict basis tramples those purposes. There will be no benefit to Ohio, California, appellee Andrea A. Barth or the Barth children if jurisdiction is relinquished to California in this matter. The only person or entity to benefit would be appellant, the perpetrator of the fraud that was employed to manipulate jurisdiction.

¹ In *Reese v. Reese* (May 22, 1977), 8th Dist. No. 71336, the court ruled upon jurisdiction in a divorce case, in part, based upon public policy. Plaintiff moved from Ohio for 21 days, solely to escape defendant's domestic violence. The court rejected defendant's argument that Ohio did not have jurisdiction over the divorce action due to plaintiff's absence from Ohio on the date she filed her complaint because "[t]o find that victims of domestic violence who seek temporary shelter in another state forfeit their rights as residents would deny such victims the protection available to them under R.C. 3113 during the period they would be required to re-establish residency." At page 2.

CONCLUSION

On the foregoing grounds, appellee Andrea A. Barth submits that the Supreme Court should dismiss this certification for lack of conflict. If, however, the Court does not dismiss the certification, appellee respectfully requests that this Court affirm the decision of the lower court.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing merit brief of appellee Andrea A. Barth was forwarded this 11th day of November, 2006, to the following:

by regular mail to:

Timothy J. Fitzgerald, attorney for
defendant-appellant Jeffrey Barth
Gallagher Sharp
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, Ohio 44115-2108; and

by regular mail to:

John J. Ready, guardian *ad litem*
John J. Ready & Associates
905-A Canterbury Road
Westlake, Ohio 44145.

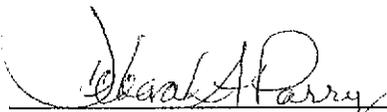
Attorney for plaintiff-appellee Andrea A. Barth

CONCLUSION

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WOLF AND AKERS
A Legal Professional Association

By:



Deborah Akers-Parry (0017997)
1717 East Ninth Street, Suite 1515
Cleveland, Ohio 44114
(216) 623-9999
(216) 623-0629 facsimile

Attorney for plaintiff-appellee Andrea A. Barth

CERTIFICATE OF SERVICE

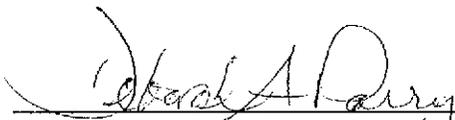
I hereby certify that a copy of the foregoing merit brief of appellee Andrea A. Barth was forwarded this 13th day of November, 2006, to the following:

by regular mail to:

Timothy J. Fitzgerald, attorney for
defendant-appellant Jeffrey Barth
Gallagher Sharp
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, Ohio 44115-2108; and

by regular mail to:

John J. Ready, guardian *ad litem*
John J. Ready & Associates
905-A Canterbury Road
Westlake, Ohio 44145.



Attorney for plaintiff-appellee Andrea A. Barth

APPENDIX

O Const IV Sec. 3 Organization and jurisdiction of courts of appeals

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

(1994 HJR 15, am. eff. 1-1-95; 132 v HJR 42, adopted eff. 5-7-68)