

IN THE SUPREME COURT OF OHIO

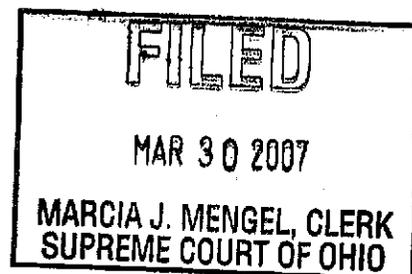
ANDREA A. BARTH,)	CASE NUMBER 06-896
)	
Appellee,)	Appeal from Cuyahoga County 8 th
)	District Court of Appeals
vs.)	Case. No. 86473
)	
JEFFREY BARTH,)	
)	
Appellant.)	

GUARDIAN AD LITEM'S MOTION FOR RECONSIDERATION

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IN THE SUPREME COURT OF OHIO

ANDREA A. BARTH,)	Court of Appeals Case No. 86473
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Appellee,)	CASE NUMBER 06-896
vs.)	
)	
JEFFREY BARTH,)	GUARDIAN AD LITEM'S
)	MOTION FOR
Appellant.)	RECONSIDERATION
)	

John J. Ready, Guardian *Ad Litem* and counsel for the minor children, Alexander and Sarah Barth, respectfully requests this Court reconsider their decision of March 21, 2007, and affirm the decision of the Eight District Court of Appeals.

The Court's opinion comes after analyzing whether Ohio Revised Code §3105.03 should be read "strictly," without consideration given to "motives of either spouse." (Syllabus of the Court, ¶2).

The Court should not have engaged in an analysis of "motive" under the circumstances and given the facts of this case. The Court should not have disregarded facts found by the Magistrate in reaching his correct result in this case. For example, the Magistrate found as follows:

- The minor children were never disenrolled from the Westlake City Schools until August 24, 2004, or two days after Appellee filed for divorce in Ohio, and then only by Appellant. (Magistrate's Decision, Pg. 3).

- The Appellee never quit her job in Ohio rather, she was on a leave of absence from Abbot Laboratories while in California. (Magistrate's Decision, Pg.2).
- Ohio is the home state of the minor children for purposes of Ohio Revised Code §3109.22(A)(1). (Magistrate's Decision, Pg. 4).
- The Appellant unilaterally disenrolled the children from the Westlake, Ohio public schools and tried to enroll them in school in California after Plaintiff filed for divorce in Ohio. (Magistrate's Decision, Pg. 3).

In addition, this Court should conclude as follows:

- Appellant did not acquire a fixed address in California until June 28, 2004 (Tr. 80, 142).
- Appellant himself had not acquired a permanent residence for purposes of California's divorce statute and, if not, he remained a resident of Ohio for purposes of Ohio Revised Code §3105.03.
- Appellant's counterclaim alleges that he was a resident of Ohio immediately proceeding the filing of his counterclaim. (Answer Pg. 3, ¶17, Supplement Vol. I, Pg. 43).

If Appellant's occasional physical presence in California did not deprive him of his admitted Ohio residency for purposes of filing his counterclaim, he should not now be heard to complain that Appellee invoked the jurisdiction of the Ohio court during her continuous (albeit temporarily interrupted) residency in Ohio.

APPELLEE NEVER OBTAINED A CALIFORNIA DOMICILE AND THEREFORE
REMAINED AN OHIO DOMICILIARY.

In order for this Court to conclude that Ohio had no jurisdiction in this matter, the panel must have concluded that Appellee abandoned her Ohio domicile and obtained a California domicile; and that the trial court erred in their finding that Ohio remained Appellee's domicile.

In order to obtain a California domicile, the Appellant needed to prove by a preponderance of the evidence that Appellee intended to make California her permanent home. Hager v. Hager (1992). 79 Ohio App.3d 239. 607 N.E.2d 63. The Court could not logically reach this conclusion (that Appellee intended to make California her principle and permanent home) when she left that state and returned to Ohio before she could have properly been considered a California domiciliary.

The Appellee's flight from California to Ohio is, *ipso facto*, a manifestation of her intent not to make California her permanent residence. Appellee had no intent to remain in California.

Furthermore, the fact that Appellee remained in Westlake, Ohio, ever since August 2004, along with the minor children, in a home she owned in Ohio, is further evidence in support of the rebuttable presumption that Ohio was, indeed, her domicile.

Westlake, Ohio, is in fact "the place to which Appellee intended to return and from which she had no present purpose to depart." McMaken v. McMaken (1994). 96 Ohio App.3d 402. 605 N.E.2d 113 and Smerda v. Smerda (1947), 48 Ohio Law Abs. 232.

This Court could and should have properly concluded that the transition from an Ohio domicile to a California domicile was incomplete, and that Appellee remained an Ohio domiciliary for purposes of Ohio Revised Code §3105.03.

Domicile is physical presence and intent 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. The majority misapplied an analysis of “motive” in this case.

Ohio law has always embraced intent to remain as a key component of domicile. *See generally*, Sturgeon v. Korte (1878), 34 Ohio St. 525. The Court should have held that Appellee’s temporary absence from the state of Ohio did not deprive her of her domiciliary residence or her Ohio domicile, and that she could not properly be a California domiciliary until she abandoned her Ohio domicile. She did not abandon her Ohio domicile because she returned to Ohio before she became a California domiciliary. However, the majority would leave Appellant and others in transition between domiciles with no domicile whatsoever in which to seek relief.

It is axiomatic that everybody has to be domiciled somewhere. The Plaintiff’s six week presence in California in the summer of 2004 would not have given her sufficient statutory contacts with California to invoke the jurisdiction of the courts in California. 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.

According to the majority, Appellant would be unable to file for relief in an Ohio court while unable to file for relief in a California court. The majority would leave Appellant with absolutely no court to turn to for relief. The Court’s incorrect conclusion

fails to account for the fact that California law would not have considered her a resident for a sufficiently long period of time to file a divorce action in California. Ohio was the only place Appellee could have filed for divorce.

THE TRIAL COURT PROPERLY APPLIED THE LAW OF DOMICILE TO THE FACTS OF THIS CASE

The trial court below used the exact same analysis as the Heath and McMaken courts, but came to a different factual finding because of very different underlying facts. Heath v. Heath (March 7, 1997). 6th Dist. No. L-96-288. In Heath, the Sixth District held that Plaintiff had no intent to permanently reside in Ohio. In McMaken, the whole notion of intent was examined extensively, and the decision is replete with references to an examination of the parties' intent when the issue of domiciliary residence is contemplated. The McMaken decision was in fact limited to the facts of that case, and the McMaken court held "on this record, the trial court lacked jurisdiction."

The facts of this case most closely resemble the facts of the Reese case cited in the guardian *ad litem*'s Brief. Reese v. Reese (May 22, 1997), Cuyahoga App. No. 71336. Like the instant case, the plaintiff in Reese was absent from the state for a matter of weeks (unlike the facts in Heath and McMaken). In Reese, the Eighth District rightly concluded that the plaintiff's Ohio domicile was not abandoned. Appellee's Ohio domicile was never abandoned.

On reconsideration, this Court is respectfully requested to review the facts found by the trial court in analyzing whether the law was correctly applied to those facts.

THE MAJORITY DECISION IS A DENIAL OF EQUAL PROTECTION

The Constitution of the United States provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1, made applicable to the states by the 14th Amendment of the United States Constitution. Likewise, the Ohio Constitution states that “[g]overnment is instituted for their equal protection and benefit.... OH CONST. Art. 1, § 2.

Because Appellee was not a resident of California long enough to give that court jurisdiction over her marriage to Appellant, and because the courts in California have never had jurisdiction over the parties’ minor children, the only court she could have turned to was located in the state of her continuing domicile, in Ohio.

Appellee could not have abandoned her Ohio domicile before establishing her California domicile, thus leaving her without any jurisdiction in the entire United States in which to seek legal relief. Since Appellee did not reside in California long enough to establish her domicile there for purposes of filing for divorce or seeking other affirmative relief, Ohio must have retained jurisdiction until such time as California became Appellee’s domicile and its courts could accept jurisdiction. Because Appellee did not stay in California long enough for this to ever occur, Ohio was still her state of domicile when she returned to Ohio in August 2004.

If this Court does not reconsider the majority decision, then Appellee will be denied the equal protection of the laws of the State of Ohio. If Appellee is left without a jurisdiction to enforce her rights under the laws of this state, she will have been effectively

denied equal protection of the laws of this state in violation of the United States Constitution and the Ohio Constitution.

O.R.C. §3105.03 SHOULD BE READ IN PARI MATERIA WITH THE UCCJEA

Furthermore, since Ohio is the only state that has proper jurisdiction over the children in this matter, Ohio is the only jurisdiction that can allocate parental rights and responsibilities. The Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter “UCCJEA”) gives 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.

Ohio was and is, 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 six (6) weeks in 2004 when they were temporarily in California. They have resided in Ohio continuously since August 2004. Appellant has also continuously maintained a residence in Westlake, Ohio while this matter has remained pending in Ohio.

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. As the 8th 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 in addition to allocating parental rights and responsibilities pursuant to the UCCJEA.

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. Rather, Ohio would continue to be the home state for the purposes of allocating parental rights and responsibilities.

Ohio Revised Code §3105.03 should be read in *pari materia* with the UCCJEA, and the Ohio court should also continue to exercise jurisdiction over the marriage of these Ohio

residents. Since the Ohio Courts retain exclusive jurisdiction over the children due to the pervasive and significant contacts the children and Appellee have with Ohio, under the UCCJEA, it is only logical that Ohio's courts determine the marital rights of these parties as well as avoid inconsistent results.

CONCLUSION

The guardian *ad litem* for the minor children, Alexander and Sarah Barth, respectfully and urgently requests this Court to reconsider their incorrect conclusion, that the Appellee is no longer an Ohio domiciliary, and reconsider the specific facts in this matter as found by the trial court. Without consideration to "motives," the guardian *ad litem* respectfully requests this Court apply the law of domicile and affirm the decision of the Eighth District Court of Appeals.

Appellee is entitled to equal protection under the law, but the majority's opinion leaves Appellee without a forum to assert her rights anywhere in the United States, in violation of the U.S. Constitution and Ohio Constitution.

Respectfully submitted,

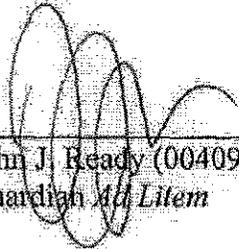


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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon counsel for Appellant, Timothy J. Fitzgerald at Gallagher Sharp, Bulkley Building, Sixth Floor, 1501 Euclid Avenue, Cleveland, Ohio 44115-2108, and counsel for Appellee, Deborah Akers-Perry at Wolf and Akers, L.P.A., 1717 East Ninth Street, Cleveland, Ohio 44114 by regular U.S. mail this 29 day of March 2007.

Respectfully submitted,



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