

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

**MOTION OF APPELLEE ANDREA A. BARTH
FOR RECONSIDERATION**

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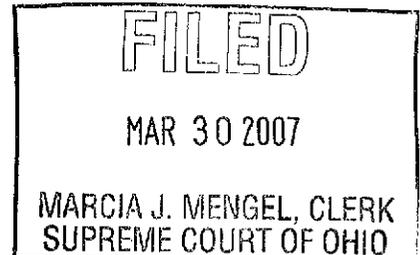
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Now comes plaintiff Andrea A. Barth, by counsel, and moves for reconsideration of the judgment entry filed on March 21, 2007, for the reasons set forth below.

MOTIVE WAS NOT ARGUED BY A PARTY OR RULED BY A LOWER COURT TO BE AN ELEMENT OF DOMICILE. THE DECISION OF THIS COURT DOES NOT ADDRESS THE QUESTION OF INTENT, WHICH IS CENTRAL TO THE APPEAL AND CERTIFICATION FOR CONFLICT.

This Court reversed on the ground that motive cannot be considered in determining domicile for purposes of R.C. 3105.03. Neither party argued for or against motive as an element of domicile. The Court of Appeals did not certify the question of whether the motives of the parties can be considered in determining domicile for purposes of R.C. 3105.03. The question certified was whether intent and fraud can be considered. Neither the trial court nor the Court of Appeals made findings or entered rulings on motive. Both courts considered intent, holding that the fraud of defendant appellant Jeffrey Barth made impossible the formulation by Andrea of the required intent to abandon Ohio or to adopt California as her domicile. There was no mention of motive at any stage of these proceedings prior to issuance of this Court's decision.

The law clearly distinguishes between motive and intent. The law is likewise clear that it is intent that is an element of domicile, as set forth in detail in brief of appellee. “‘Motive’ and ‘intent’ are not interchangeable terms.” A court’s determination that there is or is not motive is not determinative of the existence or lack of intent. *State v. Smith*, 8th Dist. No. 84292, 2004-Ohio-6111, at ¶19, reversed on other grounds at 105 Ohio St.3d 289, 825 N.E.2d 157, 2005-Ohio-1651 (Ohio Apr 20, 2005) (NO. 2004-2152). This Court held in *State v. Wyant*, 64 Ohio St.3d 566, 1992-Ohio-103, as follows at pages 571-572¹:

There is a significant difference between why a person commits a crime and whether a person has intentionally done the acts which are made criminal. Motive is the reasons and beliefs that lead a person to act or refrain from acting. The same crime can be committed for any of a number of different motives.

* * *

“Intent” refers to the actor's state of mind or volition at the time he acts. Did A intend to kill B when A's car hit B's, or was it an accident? This is not the same as A's motive, which is why A intentionally killed B.^{FN 8} When A murders B in order to obtain B's money, A's intent is to kill and the motive is to get money. LaFave and Scott, *supra*, at 319. One can have motive without intent, or intent without motive. For instance, the wife of a wealthy but disabled man might have a motive to kill him, and yet never intend to do so. A psychopath, on the other hand, may intend to kill and yet have no motive.

FN8. Black’s makes the distinction as well; under the definition of “intent” it states: “Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted.” Black’s Law Dictionary (6 Ed.1990) 810.

¹ reversed on other grounds at 508 U.S. 969, 113 S.Ct. 2954, 125 L.Ed.2d 656, 61 USLW 3830, 61 USLW 3834 (U.S.Ohio Jun 14, 1993) (NO. 92-568).

It is apparent that motive and intent are no more validly interchangeable for purposes of civil actions than for criminal actions. Andrea Barth's reasons for going to California or returning to Ohio are immaterial to the determination of domicile; however, as set forth in great detail and supported by ample citation of law and evidence, her intent is highly relevant to determination of her domicile, and that intent was negated by the fraud of her husband.

This Court acknowledges at ¶12 of the decision that a resident of Ohio for purposes of R.C. 3105.03 is a person who possesses a domiciliary residence, that is, a residence accompanied by an "*intention*" to make Ohio a permanent home. Emphasis in original. This holding, coupled with the determination in the trial and appeals courts that Jeffrey Barth's fraud precluded her ability to form the intent necessary to change her domicile, requires that this Court affirm the decision of the Court of Appeals. For these reasons, appellee Andrea A. Barth moves for reconsideration of this Court's decision.

THIS COURT HAS EFFECTIVELY REVERSED ON
THE MANIFEST WEIGHT OF THE EVIDENCE.

By ruling at ¶16 that "there is no legal basis" for the conclusion that Andrea Barth did not have the requisite factual information to form intent to abandon her domicile in Ohio or to adopt a domicile in California, this Court effectively reversed on the basis that there was insufficient evidence to support the decision of the trial court. Clearly there was abundant evidence to support the decision that Andrea had not formulated the requisite intent. The statement in ¶16 of the decision that "[a] person may intend to create a residence without awareness of every available fact regarding the decision" further evidences that the reversal was based upon the manifest weight of the evidence. The words "every available fact" clearly address the amount of

evidence. This Court in *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273, held at page 80:

While we agree with the proposition that in some instances an appellate court is duty-bound to exercise the limited prerogative of reversing a judgment as being against the manifest weight of the evidence in a proper case, it is also important that in doing so a court of appeals be guided by a presumption that the findings of the trier-of-fact were indeed correct. [FN3]

FN3. See 5 Ohio Jurisprudence 3d (1978) 191-192, Appellate Review, Section 603, which states:

" * * * [I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *

"If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. The interplay between the presumption of correctness and the ability of an appellate court to reverse a trial court decision based on the manifest weight of the evidence was succinctly set forth in the holding of this court in *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578: "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." See, also, *Frankenmuth Mut. Ins. Co. v. Selz* (1983), 6 Ohio St.3d 169, 172, 451 N.E.2d 1203; *In re Sekulich* (1981), 65 Ohio St.2d 13, 16, 417 N.E.2d 1014 [19 O.O.3d 192].

There was some competent credible evidence going to all of the essential elements of this case, and this case should not be reversed on the casual basis that “[a] person may intend to create a residence without awareness of every available fact regarding the decision.” Wherefore, plaintiff Andrea A. Barth moves for reconsideration of the decision in this matter.

THIS COURT INCORRECTLY FOUND THAT THE TRIAL COURT APPLIED
R.C. 3109.22 IN ORDER TO DETERMINE THE RESIDENCE OF APPELLEE
FOR PURPOSES OF JURISDICTION OVER HER DIVORCE ACTION.

The Supreme Court incorrectly found that the trial court applied R.C. 3109.22 in order to determine “residency requirements for divorce actions in Ohio.” Judgment Entry ¶¶ 7, 8 and 9. To the contrary, the trial court recognized the distinction between R.C. 3105.03 and R.C. 3109.22. This is evidenced in its ruling that Ohio has jurisdiction over the custody of the children in accord with the Uniform Child Custody Jurisdiction Act as adopted by Ohio and as then in effect. R.C. 3109.22 was the operative section of the Code pertaining to custody jurisdiction at the time. Separately, the trial court ruled that jurisdiction over the subject matter of the divorce is governed by R.C. 3105.03 and that Ohio was the domicile of Andrea at all operative times. Because this incorrect finding was a basis for the Supreme Court decision, plaintiff appellee Andrea A. Barth moves for reconsideration.

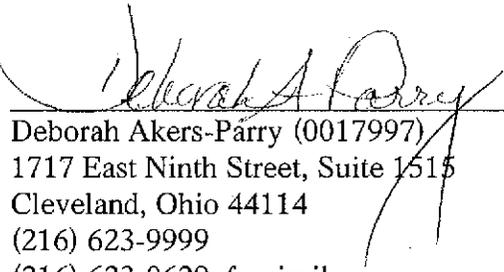
THIS COURT DID NOT ADDRESS THE ARGUMENT OF
APPELLEE THAT THERE IS NO CONFLICT AMONG THE CASES
THAT WERE CERTIFIED AS BEING IN CONFLICT.

Notwithstanding the single dissent on this basis, the Court did not address in its decision the argument of appellee Andrea A. Barth that there is no conflict among the cases that were certified as being in conflict. As set forth in brief of appellee, the courts in both *McMaken v. McMaken* (1994), 96 Ohio App.3d 402 and *Heath v. Heath* (Mar. 7 1997), 6th Dist. No. L-96-288 considered intent, and the court in *McMaken* considered the fraud that was argued to have

negated intent, as did the trial court and Court of Appeals in the case at bar. Therefore, there is no conflict among the three cases, as argued at length in brief of appellee. Appellee therefore moves for reconsideration.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion of appellee Andrea A. Barth for reconsideration was forwarded this 30th day of March, 2007, to the following:

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