ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. **LORI ANN BROWNING nka BURNS** **Plaintiff-Appellee**	)	Case No. 12-1108
vs.	)	
	)	
TERRY DEAN BROWNING Defendant-Appellant	)	On Appeal from the Muskingum County Court of Appeals, Fifth Appellate District
	)	Court of Appeals Case Nos. CT2011-CA-55 & CT2011-CA-60 (consolidated) 2012-Ohio-2158 (Trial Court No. JV000036341)

****

MEMORANDUM IN SUPPORT OF JURISDICTION
OF DEFENDANT-APPELLANT
TERRY DEAN BROWNING

****

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EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND WHY THERE IS A CONSTITUTIONAL ISSUE INVOLVED

In 1996, the Muskingum County CSEA without standing to proceed, without an administrative order of child support, and while the parties were still married and not on assistance, filed a "Motion" in their own name for child support against Defendant-Appellant. No Complaint, action, or petition was ever filed, and no UCCJA or UCCJEA affidavit was ever filed. Appellant filed a motion to vacate the judgments arising out of this series of events, stating that the trial court had never possessed jurisdiction to proceed. The trial court and the Fifth District Court of Appeals denied Appellant's arguments.

"Jurisdiction" means 'the courts' statutory or constitutional power to adjudicate the case.' "*Pratts v. Hurley*, 102 Ohio St.3d at 83. "Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, ***it can never be waived and may be challenged at any time***." *Pratts v. Hurley*, 102 Ohio St.3d at 83, citing *United States v. Cotton* (2002), 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860. ***A void judgment is one rendered by a court lacking subject-matter jurisdiction or the authority to act***. *Pratts v. Hurley*, 102 Ohio St.3d at 84; *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, 14 Ohio B. 511, 471 N.E.2d 774.

This cause presents critical issues regarding the relationship of <u>lack of standing of the Plaintiff</u>, and <u>lack of an action or complaint to initiate a case</u>, and the nature of a court's subject matter jurisdiction and voidability.

The Fifth District Court of Appeals stated in their Opinion that the Muskingum County CSEA likely lacked standing originally to bring an action against Appellant. Opinion at ¶40. However, they stated that Appellant waived that issue. The Magistrate in the trial court stated in his Opinion that the Muskingum County CSEA never filed a Complaint or Action to initiate the

underlying case. The Fifth District Court of Appeals ruled that despite the fact that there is only a "Motion", this does not deprive the court of subject matter jurisdiction. Opinion at ¶45.

Standing is implicit in the concept of subject matter jurisdiction. *Waco Indep. Sch. Dist.*, 22 S.W.3d at 853; *Doncer v. Dickerson*, 81 S.W.3d 349, 353 (Tex. App.--El Paso 2002, no pet.). Subject matter jurisdiction is essential to the authority of a court to decide a case. *Texas Ass'n of Bus.*, 852 S.W.2d at 443. Standing, as a necessary component of a court's subject matter jurisdiction, is a constitutional prerequisite to maintaining suit. Id. at 444. Standing is that aspect of justiciability focusing on the party seeking a forum rather than on the issue he or she wants adjudicated. Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). "***Standing is a jurisdictional matter antecedent to the right to relief***." *Farmer v. Kinder*, 89 S.W. 3d 447, 451 (Mo. banc 2002) (citing *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 227 n.6 (Mo. banc 1982)). To determine a party's standing is to "ask[] whether the person[] seeking relief [has] a right to do so." Id. (citing *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 475 (Mo. banc 1992)). ***If a court determines a party lacks standing, it "must dismiss the case because it does not have jurisdiction of the substantive issues presented***." Id. (citing *State ex rel. Ryan v. Carnahan*, 960 S.W.2d 549, 550 (Mo.App. E.D. 1998); Rule 55.27(g)(3)). Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which ***entitles a party to invoke the jurisdiction of the court***. *Hradecky v. State*, 264 Neb. 771, 652 N.W.2d 277 (2002). Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002); *Mutual Group U.S. v. Higgins*, 259 Neb. 616, 611 N.W.2d 404 (2000). Standing is a jurisdictional component of a party's case because ***only a party who***

has standing may invoke the jurisdiction of a court. *Governor's Policy Research Office v. KN Energy*, supra; *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000). Plaintiffs have the burden of establishing standing. *Loren v. Blue Cross & Blue Shield of Michigan*, No. 06-2090, 2007 WL 2726704 at *7 (6th Cir. Sept. 20, 2007). If they cannot do so, their claims must be dismissed for lack of subject matter jurisdiction. *Id.* (citing *Central States Southeast & Southwest Areas Health and Welfare Fund v. Merck-Medco Managed Care*, 433 F.3d 181, 199 (2d Cir. 2005)).

Standing is determined as of the time the complaint is filed. *Cleveland Branch, NAACP v. City of Parma, Ohio*, 263 F.3d 513, 524 (6th Cir. 2001), *cert. denied*, 535 U.S. 971 (2002). In addition to standing, a court may address the issue of subject matter jurisdiction at any time, with or without the issue being raised by a party to the action. *Community Health Plan of Ohio v. Mosser*, 347 F.3d 619, 622 (6th Cir. 2003).

Another issue is that of the necessity of a Complaint to initiate an action. The filing of a valid complaint is a necessary prerequisite to a court's acquiring jurisdiction. *Columbus v. Jackson* (1952), 93 Ohio App. 516, 518. A court has jurisdiction to rule on a controversy between parties if it has obtained personal jurisdiction over the parties and possesses subject matter jurisdiction over the parties' claims. *In re Burton S.* (1999), 136 Ohio App.3d 386, 391. The subject matter jurisdiction of a court is the court's power to hear and decide a case on its merits. *Id.* A court's subject matter jurisdiction is invoked **by the filing of a complaint**. *Id.* A "motion" is not a "complaint" and cannot substitute for one.

The decision of the Court of Appeals threatens the nature of subject-matter jurisdiction of the courts. The decision offends the constitutional principles of jurisdiction. Article IV, Section 4(B) of the Ohio Constitution says that courts have authority over "all justiciable matters," and

the Supreme Court of Ohio has held that justiciable matters require real, present controversies, not future controversies. Standing can only be based on the *plaintiff's* rights, not the rights of a third party. Further, a court's subject matter jurisdiction is only invoked **by the filing of a complaint.** Finally, filing of the UCCJEA Affidavit is jurisdictional, and the failure to file causes the case to be dismissed. *Frew v. Frew,* 2007 CA 17, Fifth District Court of Appeals (Coshocton County) 8-19-08.

STATEMENT OF FACTS AND OF THE CASE

On February 1, 1982 Plaintiff-Petitioner Lori A. Browning (Nka Burns) (hereinafter "Plaintiff") and Defendant-Respondent Terry D. Browning (hereinafter "Defendant") were married in Zanesville, Ohio. The couple had two children as a result of their union, to wit: Joshua Browning (DOB 5/25/82) and Jason Browning (DOB 1/31/91). On or about September 1, 1995, Plaintiff and Defendant ceased living with one another. No divorce or separation proceedings were initiated until May 1997[1]. The parties did not dispute parentage, were still married, and did not receive public assistance. On July 15, 1996, the State of Ohio, by and through the Muskingum County Child Support Enforcement Agency (hereinafter "MCCSEA"), filed a "*Motion* for 1. Child Support and 2. Medical Coverage". [2] The "Motion" moved the Muskingum County Court of Common Pleas for an Order requiring Defendant to pay child support pursuant to an amount presumed by ORC 3113.215 for his minor children and for an Order requiring Defendant to get medical coverage for said minor children. The "Motion" was

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[1] A Judgment Entry Decree of Divorce was filed on December 8, 1997. Paragraph two of the Decree states, "That the parties were married on 1st day of February, 1982 at Zanesville, Ohio and that there are two children born as issue of said marriage, to wit: Joshua born May 25, 1982 and Jason born January 31, 1991. The care, custody and control of the minor children is with the Muskingum County Juvenile Court in Case Number: 36341."

[2] Motion for Child Support, 7-15-96.

followed by a "Memorandum in Support" stating, "The Obligee and Obligor are married, but separated on or about September 1, 1995. The Obligor was designated residential parent of the minor children of the parties and they continue to reside with her. [There was in fact no order designating anyone legal custodian.] There is currently no pending motion for the care, placement, or support of the said minor children". Nowhere in the file exists the required UCCJEA O.R.C. 3109.27(A) affidavit[3]. Inexplicably, the MCCSEA had the Court sign an *Order to Appear and Show Cause* against Mr. Browning "why obligor should not be punished for failing to comply with the former order of this court". [4] Of course, there was no former order.

Thereafter, on September 24, 1996, despite no Complaint, Petition or other action being filed to determine custody, parenting time or child support, the Court released its *Findings of Fact, Conclusions of Law and Decision.* A Judgment Entry approving the Decision and adopting it as the Court's Order was entered the same date. The Decision provided the Plaintiff was awarded custody of the children, and Defendant was ordered to pay child support. Over the years the MCCSEA filed numerous contempt actions against Appellant. On December 28, 2010 MCCSEA filed a motion charging the Defendant with contempt for failure to pay child support. On June 29, 2011, Defendant, finally with Counsel, filed a motion entitled "*Defendant-Respondent Terry Browning's Memorandum Contra the MCCSEA Motion, and Motion to Dismiss the MCCSEA's Case and Vacate All Orders and/or Judgments.*" The Court set this Motion for non-oral hearing July 29, 2011. Once MCCSEA filed a reply to Defendant's Motion to Dismiss the MCCSEA's case, Defendant filed a Response to MCCSEA's reply, filed July 28, 2011.

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[3] ORC 3109.27(A) was later repealed on 4-11-2005, and replaced with ORC RC 3127.23 (A)
[4] *Show Cause Motion* 7-15-96.

The Magistrate denied Defendant's Motion on 8-4-2011[5]. Defendant timely filed Objections on 8-18-11. The Court overruled Defendant's Objections 9-21-11.[6] Defendant then timely appealed on 10-20-11, CA NO CT2011-0055. Thereafter another Order came from the trial court, on 10-27-11, similarly denying Defendant's Motion to Dismiss the MCCSEA's Case and Vacate All Orders and/or Judgments.[7] Defendant then timely filed a Notice of Appeal of the 10-27-11 Order, on 11-14-11, CA NO CT2011-0060. Both Court orders adopt the Magistrate's findings and conclusions.

Upon motion of Appellant, the Appeals Court consolidated both appeals under CA NO CT2011-0055. On May 14, 2012, the Fifth District Court of Appeals affirmed the trial court, *State ex rel Browning v. Browning*, 2012-Ohio-2158.

ARGUMENT FOR PROPOSITIONS OF LAW.

I. The Plaintiff in this case, the Muskingum County CSEA, did not have standing to invoke the court's jurisdiction and begin the case. The CSEA did not have statutory authority to bring an action[8]. The child support enforcement agency has the authority to investigate, obtain information, recalculate, and issue administrative orders modifying support. R.C. 3119.63. However, the county support enforcement agency lacked statutory authority and lacked standing to bring an action against the husband in common pleas court for child support when wife and husband **were married, did not dispute parentage, and did not receive public assistance;** two statutory exceptions permitting the agency to bring an action, when the probate court enters acknowledgement of paternity upon its journal and when the father voluntarily signs a birth

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[5] *Magistrate's Decision*, 8-4-11.
[6] *Entry* Overruling Objections, 9-21-11.
[7] *Entry* Overruling Objections 10-27-11.
[8] In fact, the MCCSEA did not file an "action" to commence a case at all, but rather filed a series of "motions".

certificate as informant pursuant to statute, did not apply. *In re Owens* (Ohio App. 8 Dist., 07-05-1994) 104 Ohio App.3d 201, 661 N.E.2d 765, appeal allowed 71 Ohio St.3d 1422, 642 N.E.2d 387, appeal dismissed as improvidently allowed 74 Ohio St.3d 1280, 658 N.E.2d 304, 1996-Ohio-273.

And ruling that the county support enforcement agency lacked standing to bring an action for child support in its own name when relator and husband were married, did not dispute parentage, and did not receive public assistance did not unconstitutionally deny relator use of the agency's services or undermine relator's right to support. *In re Owens* (Ohio App. 8 Dist., 07-05-1994) 104 Ohio App.3d 201, 661 N.E.2d 765, appeal allowed 71 Ohio St.3d 1422, 642 N.E.2d 387, appeal dismissed as improvidently allowed 74 Ohio St.3d 1280, 658 N.E.2d 304, 1996-Ohio-273.

The Fifth District Court of Appeals overruled Appellant's "standing" argument because "Father has waived any defect or objection to MCCSEA's initiating the original action by his over fourteen year delay to assert his claim." Opinion at ¶40. The Appeals Court is incorrect and did not explore the role of standing in justiciability, and Art. IV, Sec. 4(B)'s requirement of justiciability. By using Civil Rule 17 to cure standing, the Court would effectively be using the rule to expand a court's jurisdiction. A ruling that standing need not exist when a suit is filed would deviate from the long line of precedent which provides that it is a preliminary requirement.

2. Pursuant to Ohio Civ. Rule 3, a civil action is commenced by filing a complaint with the court. The filing of a complaint is a prerequisite to a court acquiring subject matter jurisdiction. No complaint, petition, or action was ever filed to initiate the underlying case. The Fifth District Court of Appeals overruled Appellant's "no Complaint" argument because

"captioning the matter as a "motion" rather that a "complaint" did not deprive the trial court of subject matter jurisdiction. Opinion at ¶45. The Appeals Court is incorrect and is in conflict with its own previous opinion in *Pankey v. Court of Common Pleas*, 10CA19 (3-16-2010) 2010-Ohio-1212.

3. Filing of the UCCJEA Affidavit is jurisdictional, and the failure to file **causes the case to be dismissed.**

Proposition of Law 1: Lack of standing is jurisdictional and is not the same as real-party-in-interest, particularly when the plaintiff is an Agency. In order to invoke the jurisdiction of the common pleas and juvenile courts, the Plaintiff-Agency must have standing at the time the complaint is filed. Standing is a necessary component of the jurisdiction of Ohio's Common Pleas courts.

The Court of Appeals held that standing is the same as real party in interest status under Civil R. 17. *Opinion* at ¶36 to ¶40. It also stated that a lack of standing at the time a suit was filed may be cured under Civ. R. 17. *Id.* The Appeals Court further held that standing is not a component of common pleas court's jurisdiction, but was merely a procedural hurdle that can be waived. *Id.* Standing and real-party-in-interest status are two distinct concepts with different legal requirements. Standing requires injury in fact traceable to the defendant's unlawful conduct. *Ohio Pyro, Inc. v. Ohio Dept. of Commerce,* 115 Ohio St.3d 375, 2007. Standing to prosecute a claim is a threshold question, one which "embodies general concerns about how courts function in a democratic system of government." *State ex rel. Ohio Academy of Trial Lawyers v Sheward* (1999), 86 Ohio St.3d 451, 469. "The question of standing is whether a litigant is entitled to have a court determine the merits of the issues presented." *Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 1994-Ohio-183, see also, *Ohio Pyro*, 2007-Ohio-5024 at ¶27. The Court of Appeals ignored the absolute necessity of standing. This Court has stated that the well-established doctrine of standing is often used to deny litigants

access to the courts. *State ex rel. Dayton Newspapers Inc. v Phillips*, 46 Ohio St. 2d 457, 459 (1976). Standing is a preliminary inquiry which must be made before a court may proceed to the merits of a case. *Kincaid v Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036. Standing determines whether the plaintiff is entitled to have an issue adjudicated, not whether the issue itself is justiciable. *Flast v. Cohen*, 392 U.S. 83, 88 (1968). Without an injury to a legal interest, a plaintiff does not have standing. In the recent cases of *Wells Fargo Bank v. Byrd,* 178 Ohio App.3d 285, 2008-Ohio-4603 (Hamilton Co. 2008); *Wells Fargo Bank u Jordan,* Cuyahoga App. 91675, 2009-Ohio-1092 (Cuyahoga Co. 2009); and *Bank of New York v. Gindele,* (Hamilton Co. 2010) 2010-Ohio-542, ¶¶2-6, the Courts held that a real party in interest analysis cannot occur until the plaintiff has standing to invoke the court's jurisdiction in the first place. And while the two concepts have their similarities, they also have at least one stark difference. A defense of real party in interest is waived, in Ohio, if not asserted, yet **standing can be raised at any time** in the proceeding. *Buckeye Foods v. Cuyahoga County Bd. of Revision,* 1997-Ohio-199, 78 Ohio St.3d 459, 460 (emphasis added); *Gildner v. Accenture, L.L.P.,* Franklin Co No. 09AP-167, 2009-Ohio-5335, ¶9 (citing *New Boston Coke Corp. v. Tyler* (1987), 32 Ohio.St.3d 216, 218). In this regard, standing's role in the jurisdictional power of a court is apparent.

"Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." *Renne v. Geary,* 501 U.S. 312, 320 (1991). Thus, the concepts of ripeness and mootness are also part of justiciability. *Id.; See also Kincaid v. Erie Ins .Co.,* 128 Ohio St.3d 322, 2010 at ¶17. But of all of the elements of justiciability, standing is the most important. "The touchstone to justiciability is injury to a legally protected right ...." *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 141 (1951); *see also, Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)(stating "[i]n its

constitutional dimension, standing imports justiciability. . ..") Without a justiciable matter before it, a common pleas court cannot enter a valid judgment. *State ex rel. Draper v. Wilder* (1945), 145 Ohio St. 447, syll. 12. A common pleas court's jurisdiction cannot be invoked just because there is a dispute, no matter how acrimonious. *State ex rel. Barclays Bank PLC v. Court of Common Pleas of Hamilton County, Ohio* (1996) 74 Ohio St.3d 536, syll ¶1. It takes two parties, with opposing interests which are legally recognized and capable of vindication. *Id.* syll ¶2. It is the justiciable dispute which permits a plaintiff to invoke the jurisdiction of an Ohio common pleas court. *State ex rel. Dallman v Court of Common Pleas, Franklin County,* (1973) 35 Ohio St.2d 176 at p. 179; *Kincaid,* supra at ¶20. **A lack of standing may not be cured, waived, or ratified.**

As was succinctly stated in *Hirsch v. TRW, Inc.,* Cuyahoga Co. Case No 04-LW-0861, 2004-Ohio-1125:

> It follows that if the courts of common pleas' original jurisdiction is limited to "justiciable matters," the subject matter jurisdiction of the court -- that is, "the power to hear and decide a case on the merits," see *Morrison v. Steiner* (1972), 32 Ohio St. 86, paragraph one of the syllabus -- is directly limited to justiciable matters.

Id. at ¶11. Therefore, standing is *an* element of the court's jurisdiction. *Rickard v Trumbull Township Bd. Zoning Appeals,* 11th Dist. No. 2008-A-0024, 2009-Ohio-2619, ¶35; *see also Woods v. Oak Hill Community Med. Ctr, Inc.,* 134 Ohio App.3d 261, 271, 2000-Ohio-161 (1999) ("The requirement that a plaintiff have standing to sue is an indispensible element of justiciability that we may not compromise."); *Helms v. Koncelik,* Franklin App. No. 08AP-323, 2008-Ohio-5073,¶22 (stating that standing is a threshold jurisdictional issue); *Northland Ins. Co. v. Illuminating Co.,* Ashtabula App. No. 2002-A-0058, 2004-Ohio-1529, ¶17 (holding that a plaintiffs lack of standing to bring a suit necessitates dismissal of the case); *First Nat'l Bank v. Randal Homes Corp.,* Pike App. 05CA739, 2005-Ohio-6129 ¶11 (stating "the issue of standing is

jurisdictional in nature and may be raised sua sponte by a court."). Because standing must be founded on an injury to its own rights, a plaintiff may not seek to enforce of the rights or interests of a third party. *Searcy v. Houston Lighting & Power Co.,* 907 F.2d 562, 564 (5th Cir. 1990). It is plaintiff's personal stake in the lawsuit that renders it a justiciable dispute. The plaintiff's legal rights have to be at issue.

Standing is determined as of the time the action is brought. *Nova Health Systems v Gandy,* 416 F.3d 1149, 1154 (10th Cir. 2005) *(citing Smith v. Sperling,* 354 U.S. 91, 93 n. 1, 77 S.Ct.1112, 1 L.Ed.2d 1205 (1957); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,* 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (stating "we have an obligation to assure ourselves that [plaintifl] had Article III standing *at the outset of the litigation.")* (emphasis added); *Focus on the Family v. Pinellas Suncoast TransitAuth.,* 344 F.3d 1263, 1275 (11th Cir. 2003) (stating "Article III standing must be determined as of the time at which the plaintiff s complaint is filed."); *Carr v. Alta Verde Indus., Inc.,* 931 F.2d 1055, 1061 (5th Cir. 1991) (stating "As with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint.").

Proposition of Law II: The filing of a valid complaint is a necessary prerequisite to a court's acquiring jurisdiction. A "motion" is not a "complaint" and cannot substitute for one. A trial court does not have the authority to waive the requirements of Civ.R. 3(A).

The filing of a valid complaint is a necessary prerequisite to a court's acquiring jurisdiction. *Columbus v. Jackson* (1952), 93 Ohio App. 516, 518. A court has jurisdiction to rule on a controversy between parties if it has obtained personal jurisdiction over the parties and possesses subject matter jurisdiction over the parties' claims. *In re Burton S.* (1999), 136 Ohio App.3d 386, 391. The subject matter jurisdiction of a court is the court's power to hear and decide a case on its merits. *Id.* A court's subject matter jurisdiction is invoked **by the filing of a**

complaint. *Id.*

A "motion" is not a "complaint" and cannot substitute for one. A court's subject matter jurisdiction is invoked by the filing of a complaint, not a motion. The filing of a motion to commence an action does not confer subject matter jurisdiction on the Court. Ohio Civ.R. 8(A) addresses the requirements of a complaint: "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, shall contain (1) a short and plain statement of the claim **showing that the pleader is entitled to relief**, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded." The Fifth District Court of Appeals has recently addressed the distinct difference between a motion and a complaint:

> **"For the purposes of Civ. R. 3(A), the filing of a motion cannot substitute for the filing of a complaint.** The Second Appellate District Court has explained that "Civ. R. 7 distinguishes a *pleading* from a *motion*. 'Under Civ. R. 7(A), only complaints, answers and replies constitute pleadings.' "(Emphasis original.) *State v. Wilkins* (1998), 127 Ohio App.3d 306, 310, 712 N.E.2d 1255, dismissed (1999), 85 Ohio St.3d 1213, 709 N.E.2d 169, quoting *State ex rel. Hanson v. Guernsey Cnty. Comrs.* (1992), 65 Ohio St.3d 545, 549, 605 N.E.2d 378. A complaint is a pleading that need only contain a short and plain statement of the claim showing that the party is entitled to relief. Civ. R. 8(A)(1). Where as a "motion" is defined as an application to the court for an order. Civ. R. 7(B)(1). A motion is not a pleading. *State Edison Co. v. Oehler* (Oct. 4, 1995), 9th Dist. No. 17167, at 9, appeal not allowed (1996), 75 Ohio St.3d 1405. Thus, in the context of this case, **a party cannot initiate an action by filing a motion.** See Civ. R. 7(A) (stating that the only pleadings allowed to be filed with the court are: a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, a third-party answer, or a court-ordered reply to an answer or third-party answer). *Martin v. Wayne County Nat. Bank Trust*, 2004 WL 1778822, 3 (Ohio App. 9 Dist.)."

See *Pankey v. Court of Common Pleas*, 10CA19 (3-16-2010) 2010-Ohio-1212

The Magistrate in his decision states, "The defendant **does correctly assert** that the CSEA failed to comply with Civ. R. 3 and/or Juv. R. 10 by styling its original filing as a "Motion" rather than a "Complaint" . . . However, the defendant had the opportunity ---- and the

obligation --- to challenge the sufficiency of process either by filing a motion prior to hearing or by raising the defense of insufficiency of process at the August, 28, 1996. The defendant did neither. Consequently, he waived the defense of lack of personal jurisdiction and the defense of insufficiency of process."[9]

But, a trial court does not have the authority to waive the requirements of Civ.R. 3(A). See *Martin v. Wayne Cty. Natl. Bank*, Unpublished Decision (8-11-2004) 2004-Ohio-4194. The defense of subject matter jurisdiction can never be waived. *In the Matter of C.W.*, 2005-Ohio-3905, citing *Time Warner AxS v. Pub.Util. Comm.*, 75 Ohio St.3d 229, 223, 1996-Ohio-224. Thus, objections based on lack of subject matter jurisdiction may be raised at any stage of the proceedings. *In re Byard*, 74 Ohio St.3d 294, 296, 1996-Ohio-163. The question of subject matter jurisdiction is so basic that it can be raised at any stage before the trial court or any appellate court, or even **collaterally in subsequent and separate proceedings**. *State v. Williams* (1988), 53 Ohio App.3d 1, 4.(emphasis added).

Judgments rendered by courts lacking subject matter jurisdiction are *void ab initio*. *Patton v. Diemer* (1988), 35 Ohio St.3d 68, at paragraph three of the syllabus; *Bright v. Family Medicine Fdn., Inc.* 10th Dist. No. 02AP-1443, 2003-Ohio-6652, at ¶ 14 (citation omitted); *Nelson v. Szykulski* (Dec. 5, 1997), 11th Dist. No. 97-T-0042, 1997 Ohio App. LEXIS 5446, at *6 (citation omitted). Thus, subject matter jurisdiction, unlike personal jurisdiction, is not subject to waiver, and forms the basis for a mandatory dismissal of an action. *State ex rel. Lawrence Dev. Co. v. Weir* (1983), 11 Ohio App.3d 96, at paragraphs one and two of the syllabus.

A judgment rendered based upon the improper complaint is a nullity because the court's subject matter jurisdiction was never properly invoked. See *Alliance Group, Inc. v. Rosenfield*

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[9] *Magistrate's Decision*, p.4.

(1996), 115 Ohio App.3d 380, 387-388. Because the Court in this matter never acquired subject matter jurisdiction, all alleged Orders and Judgment Entries are void *ab initio*. Orders and entries of the Court that lack subject-matter jurisdiction are "deemed void . . . nullities without legal effect," and must be vacated. See *Board of Health v. Pearson* (9th Dist., June 15, 2005), Summit App. No. 22194, 2005-Ohio-2964, unpublished. "No amount of acquiescence can make a void judgment valid." *State ex rel. Tackett v. Dayton*, Montgomery App. No. 6742, (June 25, 1981), unreported, 1981 WL 2838. A void judgment is one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306. A trial court has the inherent power to set aside a null and void judgment. *Lincoln Tavern, Inc. v. Snader* (1956), 165 Ohio St. 61, 133 N.E.2d 606 See, also, *Molz v. Magdych*, Trumbull App. No. 96-T-5396, (August 23, 1996), unreported, 1997 WL 537858, citing *Thorpe v. Oakford*, Portage App. No. 94-P-0057, (January 19, 1996), unreported, 1996 WL 200580; see, also, *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph four of the syllabus ("The authority to vacate a void judgment is not derived from Civ. R. 60(B) but rather constitutes an inherent power possessed by Ohio courts").

Presumably, Ohio Administrative Code sec. 5101:12-45-05 (2) is the applicable code section in this matter regarding child support. The CSEA is instructed to "file a court action." The only way to commence a court action is to file a Complaint. A court action cannot be initiated by motion. *Martin v. Wayne County Nat. Bank Trust*, 2004 WL 1778822, 3 (Ohio App. 9 Dist.). A "motion" is not a "complaint" and cannot substitute for one. A court's subject matter jurisdiction is invoked by the filing of a complaint, not a motion. The filing of a Motion to commence an action does not confer subject matter jurisdiction on the Court.

It is Juvenile Rule 10 here also that is important. Juv. R. 10 (A) states,

"...Filing. ...Any person may file a **complaint** to have determined the custody of a child not a ward of another court of this state, and any person entitled to the custody of a child and unlawfully deprived of such custody may file a complaint requesting a writ of habeas corpus. Complaints concerning custody shall be filed in the county where the child is found or was last known to be.
Any person with *standing* may file a *complaint* for the determination of any other matter over which the juvenile court is given jurisdiction by the Revised Code. The complaint shall be filed in the county in which the child who is the subject of the complaint is found or was last known to be. In a removal action, the complaint shall be filed in the county where the foster home is located. " Juv.R. 10(A) (emphasis added.)

There is nothing in any Juvenile or Ohio Administrative Rule indicating that a court action may be initiated by anything other than a Complaint, in accord with Civil Rule 3(A). Even if one were to "liberally construe" this requirement, uniformity in procedure, fairness in administration, and recognition and enforcement of Defendant's constitutional and other legal rights, pursuant to Juv.R.1(B), demand that the action be commenced by a Complaint. The CSEA, as an administrative agency, has only the powers given it by statute or rule.

<u>Proposition of Law No. III</u>: Filing of the UCCJEA Affidavit is jurisdictional, and the failure to file causes the underlying case to be dismissed.

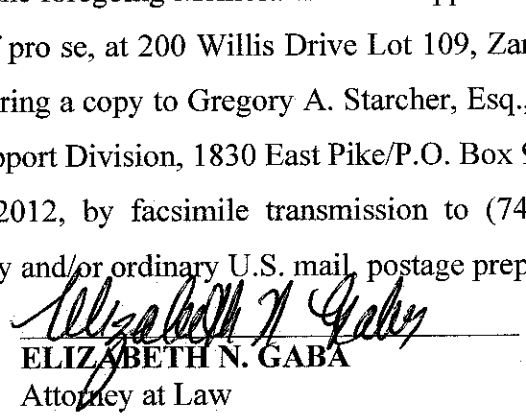
In this instant case, the CSEA was somehow bringing the action, and they failed to submit the proper custody affidavit that confers jurisdiction. Child support is a subset of the allocation of parental rights and responsibilities under Title 31 of the Ohio Revised Code. At the time of the September 24, 1996 Judgment Entry, or at any point thereafter, the trial court did NOT HAVE jurisdiction to hear the matter, due to the failure to file the mandatory affidavit. There is no evidence in the file that the children lived in Muskingum County at the time of the Court's September 24, 1996 Judgment Entry. In fact, there is absolutely no evidence whatsoever of the children's whereabouts or residence at all. Even if there is no indication that there is any jurisdictional conflict, as in *Frew v. Frew,* 2007 CA 17, Fifth District Court of Appeals (Coshocton County) 8-19-08., the filing of the UCCJEA affidavit <u>is jurisdictional</u>, and the lack of submitting the affidavit is a jurisdictional defect.

CONCLUSION: For the reasons discussed above, this case involves matters of public and great general interest and involves substantial constitutional questions. The appellant requests that this Court accept jurisdiction.

Elizabeth Gabo

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Support of Jurisdiction was served upon Lori Ann Burns, Plaintiff pro se, at 200 Willis Drive Lot 109, Zanesville Ohio 43701, and Plaintiff State of Ohio by tendering a copy to Gregory A. Starcher, Esq., Muskingum County Job and Family Services, Child Support Division, 1830 East Pike/P.O. Box 9, Zanesville, Ohio 43702, on this 28th day of June 2012, by facsimile transmission to (740) 588-4315 (CSEA), and/or E-mail and/or hand delivery and/or ordinary U.S. mail, postage prepaid.



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FILED
FIFTH DISTRICT
COURT OF APPEALS

MAY 1 4 2012

MUSKINGUM COUNTY, OHIO
TODD A. BICKLE, CLERK

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, EX REL. LORI ANN BROWNING NKA BURNS Plaintiff-Appellee -vs- TERRY DEAN BROWNING Defendant-Appellant	:	JUDGES: Hon. W. Scott Gwin, P.J. Hon. Sheila G. Farmer, J. Hon. Julie A. Edwards, J. Case No. CT2011-CA-55 CT2011-CA-60 OPINION

CHARACTER OF PROCEEDING: Criminal appeal from the Muskingum County Court of Common Pleas, Domestic Relations Division, Case No. JV00036341

JUDGMENT:

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

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Gwin, P.J.

{¶1} Defendant-appellant Terry Dean Browning ("Father") appeals in Fifth District Case No. CT-2011-55, the September 21, 2011 Judgment Entry of the Muskingum County Court of Common Pleas, Domestic Relations Division denying his motion to dismiss and vacate[1]. Father appeals in Fifth District Case No. CT2011-0060, the October 27, 2011 Judgment Entry of the Muskingum County Court of Common Pleas, Domestic Relations Division overruling his objections to the magistrate's decision.[2] Plaintiff-appellee in both cases is the Muskingum County Job and Family Services, Child Support Division ("MCCSEA"). This Court has consolidated these cases for appeal by Judgment Entry filed January 3, 2012.

Facts and Procedural History

{¶2} On February 1, 1982 Lori A. Browning (nka Burns) ("Mother") and Father were married in Zanesville, Ohio. The couple had two children, Joshua Browning b. May 5, 1982 and Jason Browning, b. January 31, 1991. On or about September 1, 1995, Father and Mother ceased living with one another. No divorce or separation proceedings were initiated at that time.

{¶3} These cases originated in the Muskingum County Juvenile Court on July 15, 1996 as an application requesting Father pay child support and obtain health care insurance for the parties' two minor children. The case caption is styled as Case No. 36341.

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[1] Father's motion was filed June 29, 2011
[2] Father's objections were filed August 18, 2011.

{¶4} Service of the application and notice of hearing were perfected by certified mail upon both Mother and Father.[3]

{¶5} By Judgment Entry filed September 24, 1996, the trial court found,

> The Court has jurisdiction over this action and the parties to this action, including jurisdiction to determine custody of the minor children of the parties under Section 2151.23 and Chapter 3109.36 of the Revised Code.
>
> * * *
>
> The parties are agreed that custody shall remain with the Plaintiff.
>
> * * *
>
> Pursuant to O.R.C. Section 2151.23(A) (2), Plaintiff is granted custody of the minor children. Pursuant to O.R.C. Section 2151.23(F)(1), custody shall mean that this Order is a Parenting Decree as defined in O.R.C Section 3109.21(D), and that Plaintiff is designated as the residential parent and legal custodian of the children. Defendant is designated as the noncustodial or nonresidential parent.
>
> * * *
>
> Plaintiff shall maintain hospitalization and medical insurance coverage for the minor children through her employer. All medical and health care needs of the Children not paid by any insurance shall be paid by the parties as follows:

[3] A transcript of the hearing held on August 28, 1996 is not available from the Juvenile Court as the tape used to record the hearing has been erased or reused. Both parties attended that hearing.

> Plaintiff shall pay first $100.00 per child per year in expenses not paid by insurance, including any deductible. Any additional expenses not paid by insurance shall be divided between the parties with Defendant paying 50% and Plaintiff paying the remaining 50%.
>
> * * *

{¶6} Neither party appealed the adoption of those findings by the trial court.

{¶7} The parties ultimately commenced a civil action by a Complaint for Divorce in the Domestic Relations Division of the Court of Common Pleas of Muskingum County, Ohio filed on May 23, 1997.

{¶8} In connection with the divorce action, the parties filed a Separation Agreement on November 24, 1997. That Separation Agreement states in part:

> This Agreement is made and entered into between Terry D. Browning, hereinafter referred to as Husband, and Lori A. Browning, hereinafter referred to as Wife, both of whom represent that:
>
> There are two children born as issue of said marriage, to wit: Joshua born May 25, 1982 and Jason born January 31, 1991. The care, custody and control of the minor children are with the Muskingum County Juvenile Court in Case Number: 36341.

{¶9} A Judgment Entry Decree of Divorce was filed on December 8, 1997. Paragraph two of the Decree states, "That the parties were married on 1st day of February, 1982 at Zanesville, Ohio and that there are two children born as issue of said marriage, to wit: Joshua born May 25, 1982 and Jason born January 31, 1991. The

care, custody and control of the minor children are with the Muskingum County Juvenile Court in Case Number: 36341...."

{¶10} MCCSEA filed their first Motion for Contempt on June 24, 1997. The Motion moved the Court for an Order requiring Father to appear and show cause why he should not be held in contempt of Court for failing to pay child support as previously ordered by the Court. On September 26, 1997, Father, without counsel, admitted to being guilty of contempt of Court for failing to pay his child support as ordered. This contempt was further resolved on January 26, 1998. Father was represented by counsel at that time.

{¶11} Other contempt actions were filed in October 1998, December 1999, and January 2007. Father admitted contempt each time and was approximately $9,500.00 behind in his child support in the 1998 action, $14,800.00 behind in his 1999 action, and $16,000.00 behind in his 2007 action. Each Order to Appear and Show Cause directed Father to contact his caseworker before the hearing to try to resolve any discrepancies.

{¶12} On October 30, 2000, the current child support order for the parties' oldest child, Joshua, was terminated, subject to any remaining arrears.

{¶13} In 2003, in Muskingum County Court of Common Pleas Case No. CR2003-0040, Father was charged with two counts of criminal nonsupport. Counsel different from the previous counselors who had represented him in his divorce action and the contempt actions represented Father. By entry filed August 18, 2003, Father waived the reading of the indictment, the time and manner of service, and any deficiencies therein. Father withdrew his former plea of not guilty and pled guilty to both counts in the indictment. That plea was accepted by the Court. The counts were merged

and Father was sentenced to three years community control. Father was also ordered to make restitution for his unpaid and overdue child support arrears for approximately $20,000.00 through July 31, 2003. Father was ordered to pay $250.00 per month toward this obligation.

{¶14} In January 2006, Mother requested a modification of the child support order. This matter went to the Court upon objections to the MCCSEA's recommendation. Both parties attended that hearing. A hearing was held and an order was issued. Neither party objected to, or appealed, that order.

{¶15} In order to avoid being incarcerated, Father made an $840.00 payment to bring him into compliance with the 2007 court order. Another request was made to impose the suspended sentence. Father paid $6,000.00 to avoid the jail sentence. By separate entry filed April 3, 2009, Father was placed in the "pay or appear" program of the Court. That program required Father to pay not less than $615.90 per month or appear each month to explain his non-compliance. Father's participation in that program ran from April 2009 through September 2009.

{¶16} The child support order for the youngest child of the parties was terminated effective May 23, 2009 as that child had reached the age of 18 and graduated from high school on May 23, 2009. As of April 30, 2009, Father still owed over $12,000.00 in arrears.

{¶17} Father objected to the amount ordered to be paid on his remaining arrears. On August 4, 2009, the Court issued an order requiring Father to pay $250.00 per month, and processing charge, toward his overdue and unpaid child support arrears balance of approximately $12,800.00.

{¶18} On July 13, 2010, a contempt action was filed by the MCCSEA alleging that Father failed to follow the order to pay his arrears as directed. There was a show cause hearing scheduled for November 11, 2010, which was vacated. On December 28, 2010, MCCSEA filed a motion charging Father with contempt for failure to pay child support.

{¶19} On June 29, 2011, Father filed a motion titled *"Defendant-Respondent Terry Browning's Memorandum Contra the MCCSEA Motion, and Motion to Dismiss the MCCSEA's Case and Vacate All Orders and/or Judgments."* The Court set this Motion for non-oral hearing July 29, 2011. MCCSEA filed a reply and Father filed a Response to MCCSEA's reply.

{¶20} The magistrate denied Father's motion by Judgment Entry filed August 4, 2011. Father timely filed an objection to the magistrate's decision August 18, 2011. The Court overruled Father's objections September 21, 2011. Father filed a Notice of Appeal from the September 21, 2011 Judgment Entry in Case No. CT2011-0055 on October 20, 2011.

{¶21} On October 27, 2011, a second Judgment Entry was filed similarly denying Father's Motion to Dismiss the MCCSEA's Case and Vacate All Orders and/or Judgments and adopting the magistrate's decision of August 4, 2011. Father filed a Notice of Appeal of this entry on November 14, 2011 in Case No. CT2011- 0060. This Court has consolidated these cases for appeal by Judgment Entry filed January 3, 2012.

Assignments of Error

{¶22} Father raises the following assignments of error:[4]

{¶23} "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT DID NOT DISMISS THE CASE AND VACATE ALL ORDERS IN THE CASE, AND ERRED BY FINDING THAT THE "MOTION FOR CHILD SUPPORT" FILED BY THE MCCSEA COULD EFFECTIVELY OPEN THE CASE. APPELLEE'S "MOTION" DID NOT ADHERE TO THE MANDATES OF CIV. R. 3(A) AND WAS THUS FATALLY DEFECTIVE.

{¶24} "II. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT DID NOT DISMISS THE CASE AND VACATE ALL ORDERS IN THE CASE, AND ERRED BY FINDING THAT THE "MOTION FOR CHILD SUPPORT" FILED BY THE MCCSEA COULD EFFECTIVELY OPEN THE CASE WITHOUT A UCCJA 3109.27 — UCCJEA 3127.23 AFFIDAVIT. THE APPELLEE'S "MOTION" DID NOT ADHERE TO THE MANDATES OF UCCJA 3109.27 — UCCJEA 3127.23 AND WAS THUS FATALLY DEFECTIVE.

{¶25} "III. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT DID NOT DISMISS THE CASE AND VACATE ALL ORDERS IN THE CASE, AND ERRED BY FINDING THAT THE CSEA HAD STATUTORY AUTHORITY TO ATTEMPT TO BRING AN "ACTION" IN ITS OWN NAME WHEN RELATOR AND HUSBAND WERE MARRIED, DID NOT DISPUTE PARENTAGE, AND DID NOT RECEIVE PUBLIC ASSISTANCE.

{¶26} "IV. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT DID NOT DISMISS THE CASE AND VACATE ALL ORDERS IN THE CASE,

---

[4] Father has filed a single brief.

AS THE COURT DID NOT HAVE THE POWER OR AUTHORITY TO RENDER THE PARTICULAR JUDGMENTS."

Analysis

I, II, III & IV

{¶27} In each of his four assignments of error, Father challenges the subject matter jurisdiction of the trial court. Father additionally contends that a R.C. 3109.27 affidavit was a "mandatory jurisdictional requirement" which was not done in this case and further MCCSEA had no authority to initiate an action for support in his case.

{¶28} The underlying support action was brought by the MCCSEA on behalf of the mother, a nominal co-plaintiff in 1996. R.C. 3103.03(A) and R.C. 3103.031 impose a duty on each biological or adoptive parent to support his or her minor child, regardless of the parent's gender or marital status. This obligation is owed to the state as well as to the child. *Woods v. Mt. Castle*, 2nd Dist. No. 01 CA-0050, 2002-Ohio-1878, citing *Bowen v. State*, 56 Ohio St. 235, 46 N.E. 708 (1897).

{¶29} Juvenile courts have jurisdiction over child support matters concurrent with domestic relation and common pleas courts. *Newton v. Newton*, 11th Dist. No. 2011-L-048, 2011-Ohio-6520, ¶15; *Madewell v. Powell*, 12th Dist. No. CA2006-05-053, 2006-Ohio-7046, ¶5. Under R.C. 3105.011, the domestic relations division of a court of common pleas has full authority to determine all domestic relations matters. In relation to the question of child support, R.C. 3109.05(A)(1) states that, in the context of a divorce proceeding, a domestic relations court "may order either or both parents to support * * * their children, without regard to marital misconduct."

{¶30} As a "juvenile" court, the jurisdiction of the trial court is controlled by R.C. 2151.23. As to the issue of child support, this statute provides, in pertinent part:

(A) The juvenile court has exclusive original jurisdiction under the Revised Code as follows:

" * * *

(11) * * * to hear and determine a request for an order for the support of any child if the request is not ancillary to an action for divorce, dissolution of marriage, annulment, or legal separation, * * *."

{¶31} Because Mother's request in 1996 for support was "not ancillary to an action for divorce, dissolution of marriage, annulment, or legal separation," the action was properly brought in the juvenile court, vesting that court with exclusive and continuing jurisdiction over the child support issue. *Madewell, supra at* ¶6. MCCSEA's motion to intervene in that case was granted, permitting the agency to participate and assert a claim in the juvenile court. Id. At that time, the court granted custody of the minor children to Mother as was agreed by the parties. The court further ordered Father to pay support for his children. No appeal was taken.

{¶32} By Judgment Entry filed in the subsequent divorce action, the trial court noted the jurisdiction of the Juvenile Court, as well as the prior establishment of custody and support. No appeal was taken from the trial court's Judgment Entry granting the divorce.

{¶33} Thus, in the case at bar there is no doubt that the juvenile court had subject matter jurisdiction. R.C. 2151.23.

{¶34} Courts have drawn a clear distinction between subject matter jurisdiction and standing. Subject matter jurisdiction refers to the statutory and/or constitutional power to adjudicate a case. *Pratts v. Hurley*, 102 Ohio St.3d 81, 806 N.E.2d 992, 2004–Ohio–1980, ¶11. A jurisdictional defect cannot be waived. *Painesville v. Lake County Budget Commission*, 56 Ohio St.2d 282, 383 N.E.2d 896(1978). Lack of jurisdiction can be raised at any time, even for the first time on appeal. See *In re Byard* (1996), 74 Ohio St.3d 294, 296, 658 N.E.2d 735, 737. This is because jurisdiction is a condition precedent to the court's ability to hear the case.

{¶35} A judgment entered by a court that lacks subject matter jurisdiction is void ab initio *Patton v. Diemer*, 35 O.St.3d 68, 518 N.E.2d 941(1988). The authority to vacate a void judgment is an inherent common law power. *Patton* syllabus paragraph 4, citing *Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61,133 N.E.2d 606(1956), paragraph one of the syllabus; *Westmoreland v. Valley Homes Corp.*, 42 Ohio St.2d 291, 294 (1975).

{¶36} By contrast, Civ. R. 17(A) provides in part:

> Every action shall be prosecuted in the name of the real party in interest. * * * No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

{¶37} A real party in interest is "one who has a real interest in the subject matter of the litigation, and not merely an interest in the action itself, i.e., one who is directly benefitted or injured by the outcome of the case." *Shealy v. Campbell*, 20 Ohio St.3d 23, 24–25, 485 N.E.2d 701(1985).

{¶38} If one who is not the real party in interest asserts a claim, then the party lacks standing to prosecute the action, but the court is not deprived of subject matter jurisdiction. See *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 701 N.E.2d 1002(1998), citing *State ex rel. Smith v. Smith*, 75 Ohio St.3d 418, 420, 662 N.E.2d 366, 369(1996); and *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 251, 594 N.E.2d 616, 621(1992). The lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter. Civ.R. 17. Unlike lack of subject matter jurisdiction, other affirmative defenses can be waived. *Houser v. Ohio Historical Soc.*, 62 Ohio St.2d 77, 403 N.E.2d 965(1980). Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court. *State ex rel. Smith v. Smith*, 75 Ohio St.3d at 420; *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d at 251.

{¶39} Because compliance with Civ. R. 17 is not necessary to invoke the jurisdiction of the court, the failure to name the real party in interest is an objection or defense to a claim that is waived if not timely asserted. *Suster,* supra.

{¶40} In the case at bar, Father could have, but did not, challenge the standing of MCCSEA to bring the support action in 1996 or in 1997. He did not. Accordingly, Father has waived any defect or objection to MCCSEA's initiating the original action by his over fourteen-year delay to assert his claim.

{¶41} Father further contends that pursuant to Ohio Civ. Rule 3, a civil action is commenced by filing a complaint with the court. The filing of a complaint is a prerequisite to a court acquiring subject matter jurisdiction. Because this action was commenced by filing of a "motion," Father contends the trial court never acquired subject matter jurisdiction and therefore all judgments allegedly rendered in this instant matter in the trial court are null and void ab initio.

{¶42} Civ. R. 3 provides in relevant part,

> (A) Commencement
>
> A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ.R. 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D).

{¶43} Courts of this state have recognized that the name given to a pleading or motion is not controlling. *Lungard v. Bertram*, 86 Ohio App. 392, 395, 88 N.E.2d 308(1949). Rather, the substance of the pleading or motion determines the operative effect thereof. *Id. Accord, Morris v. Children's Hospital Medical Ctr.*, 73 Ohio App.3d 437, 441, 597 N.E.2d 1110, 1112(1991); *Cooke v. United Dairy Farmers, Inc.* 10th Dist. No. 05 AP-1307, 2006-Ohio-4365, ¶29. Pleadings are to be construed to do substantial justice, and claims for relief should concisely set forth only those operative facts as are necessary to give "fair notice of the nature of the action." *Salamon v. Taft Broadcasting Co.*, 16 Ohio App.3d 336, 475 N.E.2d 1292(1984); Civ.R. 8(A), (E), and (F).

{¶44} In the case at bar, the plain words of the pleading that was filed set forth the claim for child support and health care insurance. Because Father had notice of the child support action, actually appeared, and defended his position at the child support hearings held in this case, due process was met.

{¶45} Accordingly, in the case at bar, captioning the matter as a "motion" rather that a "complaint" did not deprive the trial court of subject matter jurisdiction.

{¶46} Father next contends that the trial court lacked subject matter jurisdiction because the requirement in R.C. 3109.27 that a parent bringing an action for custody inform the court at the outset of the proceedings of any knowledge he has of custody proceedings pending in other jurisdictions is a mandatory jurisdictional requirement of such an action. Father argues that filing an R.C. 3109.27 affidavit was a "mandatory jurisdictional requirement" which was not done in this case.

{¶47} The Ohio Supreme Court has held that a mechanistic interpretation of R.C. 3109. 27 would not only contravene the clear intent of R.C. 3109. 27 but could potentially render the custody statutes of this state a nullity. *In re Palmer*, 12 Ohio St. 3d 194, 197, 465 N.E. 2d 1312(1984); *See also, In re Complaint for Writ of Habeas Corpus for Goeller,* 103 Ohio St.3d 427, 2004-Ohio-5579, 816 N.E.2d 594, ¶12. In *Palmer,* the Court acknowledged that subject-matter jurisdiction could be asserted at any time even on appeal. 12 Ohio St. 3d at 196. However, the Court established an exception in a case where children are concerned.

> Stipulation to the truth of facts necessary to insure jurisdiction may suffice to confer jurisdiction through estoppel. See *Beatrice Foods Co. v.*

Porterfield (1972), 30 Ohio St.2d 50, 282 N.E.2d 355 [59 O.O.2d 76], at paragraph one of the syllabus.

Application of the rule of estoppel is necessarily limited to the factual exigencies of each case.

* * *

If we were to deny subject-matter jurisdiction by a mechanistic interpretation of R.C. 3109.27, it would be possible for any party to completely obstruct a custody proceeding by willfully failing to file an R.C. 3109.27 affidavit or pleading. Such a result would not only contravene the clear intent of R.C. 3109.27 but could potentially render the custody statutes of this state a nullity. Moreover, such a result would hamstring our long-established rule that ultimately the issue must be what is in the best interests of the child. *In re Cunningham* (1979), 59 Ohio St.2d 100, 391 N.E.2d 1034 [13 O.O.3d 78]. Under the present circumstances, a rigid interpretation of R.C. 3109.27 would only serve to prolong the agony of the children herein. Moreover, in instances when a public agency is a party, rigid adherence to R.C. 3109.27 would open the door to the contingency where a child, inarticulate, injured, neglected and found by the roadside, could not be provided for because the public agency could not ascertain the information required under R.C. 3109.27 with regard to the places where the child had lived within the past five years, and the names and present addresses of those persons with whom the child had lived during that period.

In re Palmer at 197. Subsequent to *Palmer* courts have held, "the mandates of R.C. 3109.27, while required, are not jurisdictional so long as the statute's requirements are substantially satisfied and no prejudice results." (Citations Omitted.) *Mendiola v. Mendiola*, 11th Dist No. 2006-P-0038, 2007-Ohio-466, ¶57. *Accord, D.D. v. Hayes,* 8th Dist. No. 96825, 2011-Ohio-4963, ¶11; *In re Porter*, 113 Ohio App.3d 580, 584, 681 N.E.2d 954(3rd Dist. 1996); *Adkins v. Adkins*, 4th Dist. No. 89 CA 26, 1991 WL 87301(May 15, 1991)(Stephenson, P.J., concurring).

{¶48} We conclude that any failure to comply with R.C. 3109.27 was not prejudicial to Father. We note that Father did not object to the children remaining in the custody of Mother. Moreover, we are admonished that the ultimate issue in any custody proceeding is the "best interest of the child" and this concern is paramount to any application of the strictures of R.C. 3109.27. *Palmer, supra* at 197.

{¶49} In the case at bar, we find that a blind adherence to the affidavit requirement in the instant case would frustrate the policy behind the rule. No party in this case claims to have instituted or have knowledge of custody proceedings pending in another jurisdiction. Further, the parties have litigated the issues for over fourteen years without claiming prejudice because of the failure to file the affidavit. Finally, both children have long since been emancipated.

Conclusion

{¶50} Father's first and fourth assignments of error are overruled in their entirety because the trial court had subject matter jurisdiction over the proceedings and properly exercised that jurisdiction.

{¶51} Father's second assignment of error is overruled because the parties have litigated the issues for over fourteen years without claiming prejudice because of the failure to file the R.C. 3109.27 affidavit. In this case, blind adherence to the affidavit requirement would frustrate the policy behind the rule.

{¶52} Father's third assignment of error is overruled in its entirety because Father has waived any defect or objection to MCCSEA's initiating the original action by his over fourteen year delay to assert his claim.

{¶53} Accordingly, for the foregoing reasons, the judgments of the Muskingum County Court of Common Pleas, Domestic Relations Division are affirmed.

By: Gwin, P.J.,

Farmer, J., and

Edwards, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. JULIE A. EDWARDS

WSG:clw 0430

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED
FIFTH DISTRICT
COURT OF APPEALS

MAY 14 2012

MUSKINGUM COUNTY, OHIO
TODD A. BICKLE, CLERK

STATE OF OHIO, EX REL. LORI ANN BROWNING NKA BURNS Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TERRY DEAN BROWNING Defendant-Appellant	:	CASE NO. CT2011-CA-55

For the reasons stated in our accompanying Memorandum-Opinion, the judgments of the Muskingum County Court of Common Pleas, Domestic Relations Division are affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. JULIE A. EDWARDS

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STATE OF OHIO, EX REL. LORI ANN BROWNING NKA BURNS Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TERRY DEAN BROWNING Defendant-Appellant	:	CASE NO. CT2011-CA-60

For the reasons stated in our accompanying Memorandum-Opinion, the judgments of the Muskingum County Court of Common Pleas, Domestic Relations Division are affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. JULIE A. EDWARDS