

**IN THE SUPREME COURT OF OHIO**

SENAYT FEKADU,	)	
	)	CASE NO. 15-0363
Appellant,	)	
	)	
v.	)	On Appeal from the Cuyahoga County Court of
	)	Appeals, Eighth Appellate District Case No. CA-
N.G.,	)	14- 101425
	)	
Appellee.	)	

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**MERIT BRIEF OF APPELLANT SENAYT FEKADU**

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## STATEMENT OF FACTS

On February 27, 2012, Senayt Fekadu (“Ms. Fekadu” or “Appellant”) filed a complaint in the Cuyahoga County Court of Common Pleas, Juvenile Division (the “Juvenile Court”), Case Nos. PR 12703234 and PR 12703235 (the “Ohio Litigation”) (Supp. 1-2), seeking to establish paternity and an allocation of parental rights relative to her two minor children. The Ohio Litigation was assigned to the docket of Judge Alison Nelson Floyd. On March 20, 2012, Negasi Gebreyes (“N.G.” or “Father” or “Appellee”), filed a petition for custody in Virginia (the “Virginia Litigation”) (Supp. 3) and subsequently, on March 30, 2012, moved to dismiss Ms. Fekadu’s complaint in the Ohio Litigation for lack of subject matter jurisdiction. N.G. filed a fraudulent affidavit to support his pleadings in the Ohio Litigation. (Supp. 11-12). The affidavit, which was used to form the basis of N.G.’s jurisdictional argument, claimed incorrectly that the children resided in Virginia for six (6) months, from April 24, 2011 to November 1, 2011, before returning to Ohio on November 1, 2011 until the filing of the Ohio Litigation. The false dates N.G. provided in his affidavit were dispositive as to the issue of “home state” jurisdiction for purposes of the parties’ underlying custody petitions.<sup>1</sup>

The Juvenile Court, while failing to conduct an evidentiary hearing and relying upon the pleadings only, dismissed the Ohio Litigation on May 29, 2012. (App. 5-8). Shortly thereafter, the Virginia court issued an order on June 5, 2012 (App. 10-12), granting joint custody to Ms. Fekadu and N.G., and granting N.G. primary physical custody of the parties’ minor children. Ms. Fekadu appealed the June 5, 2012 custody order. Following a hearing on February 20, 2013, the Virginia court issued a Visitation Order on July 15, 2013 setting forth a temporary visitation

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<sup>1</sup> The threshold issue with respect to N.G.’s motion to dismiss the Ohio Litigation was whether the children’s home state remained Ohio, despite the children taking *temporary absences* from Ohio in Virginia; or, in the alternative, whether the children resided in Virginia for more than six (6) months, thereby making their absence from Ohio something other than temporary.

schedule to allow Ms. Fekadu to see her children. (App. 13-20). Additionally, the Virginia court stayed Ms. Fekadu's appeal of the June 5, 2012 custody order to permit the Juvenile Court in Ohio to hold an evidentiary hearing on the issue of whether Ohio or Virginia was the children's home state. Importantly, the Virginia Court stated "the issue of whether Virginia has subject matter jurisdiction at this point in time is **unresolved**." (App. 14). To date, the Virginia courts have not made a determination that Virginia is the home state of the children, and accordingly the issue of whether the Virginia courts actually have subject matter jurisdiction in this case remains unresolved.

While the June 5, 2012 custody order in the Virginia Litigation was outstanding, Ms. Fekadu appealed the dismissal of the Ohio Litigation before the Eighth District in Case No. CA-12-98652, asserting that the Juvenile Court had wrongly dismissed the case and that an evidentiary hearing should have been held. On February 14, 2013, the Eighth District issued a decision ordering the Juvenile Court to hold an evidentiary hearing to determine whether the children had in fact resided in Arlington, Virginia for six (6) months before returning to Ohio on November 1, 2011. Specifically the Eighth District held:

If the trial court determines, after holding an evidentiary hearing, that the children did, in fact, live in Virginia from April 24, 2011 to November 1, 2011, as father claims they did, then the Cuyahoga County Juvenile Court lacks jurisdiction to determine the action because Virginia would be the children's 'home state' under the UCCJEA \*\*\* if, however, the trial court determines that the children lived in Ohio - with only 'temporary absences' from home - then Ohio is the children's 'home state' for purposes of jurisdiction under the UCCJEA.

(App. 31).

In accordance with the Eighth District's opinion, the Juvenile Court held an evidentiary hearing on March 13, 2014. At the hearing, **N.G. admitted that the dates of the children's**

**residency he provided to the Juvenile Court in his affidavit were false.** N.G. lied when he claimed that the children were in Virginia for six (6) full months. School records, Ms. Fekadu's testimony and N.G.'s admissions at the hearing proved that the children were only in Virginia from May 17, 2011 to November 1, 2011, or approximately five and half (5½) months. Accordingly, on April 21, 2014, the Juvenile Court issued an order finding that Ohio is the home state of the parties' children and Ms. Fekadu, such that jurisdiction should properly be exercised by an Ohio court. (App. 34-37).

Following the Juvenile Court's April 21, 2014 decision, the Virginia court issued an Order of Dismissal on May 23, 2014. (App. 38-39). The Circuit Court of Arlington County dismissed the Virginia Litigation in light of (1) the Juvenile Court's determination on April 21, 2014, that Ohio was the home state of the parties' minor children, and (2) that the Juvenile Court scheduled a June 12, 2014 pre-trial to determine issues of custody and visitation. Ultimately, the Virginia court vacated the July 15, 2013 Visitation Order, dismissed the case, and conceded jurisdiction to the Ohio courts.

On May 22, 2014, N.G. commenced an original action in prohibition seeking to vacate the April 21, 2014 order of the Juvenile Court and to establish Virginia as the proper jurisdiction to resolve the parties' petitions for custody. On September 30, 2014, the Eighth District issued an opinion and order ("Opinion"), which granted the writ of prohibition ("Writ") and prohibited the Juvenile Court from exercising jurisdiction over the Ohio Litigation. (App. 40). At no time during the course of the proceedings relating to the Writ was the Eighth District informed of the May 23, 2014 dismissal of the Virginia Litigation or of the facts relating to N.G.'s false affidavit. (Supp. 23). Notably, Ms. Fekadu was not a named party to the Writ proceedings. (App. 40- 41). As soon as Ms. Fekadu became aware of the Writ, and all proceedings leading to it, she filed a

Motion to Intervene and Emergency Motion for Relief from Order (“Combined Motion”) (Supp. 13-118), on or about October 23, 2014. In a journal entry dated January 14, 2015 (“Journal Entry”), the Eighth District denied both of Ms. Fekadu’s motions, reasoning that the June 5, 2012 custody order and a later September 9, 2014 order enforcing the June 5, 2012 order are entitled to full faith and credit unless otherwise vacated. (App. 4). In so holding, the Eighth District failed to engage in any inquiry as to whether Virginia properly had jurisdiction to issue the June 5, 2012 order. Ms. Fekadu timely appealed the Eighth District’s Journal Entry on March 2, 2015. (App. 2-3).

### **ARGUMENT**

#### **PROPOSITION OF LAW NO. I:**

#### **A NONPARTY PARENT HAS A DUE PROCESS RIGHT TO INTERVENE IN A WRIT OF PROHIBITION MATTER SEEKING TO RELINQUISH JURISDICTION.**

The United States Supreme Court stated in *Troxel* that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Likewise, this Court has recognized that parents have a fundamental liberty interest in the care, custody, and management of their children. *Zivich v. Mentor Soccer Club, Inc.* 82 Ohio St.3d 367, 372, 696 N.E.2D 201 (1998). Further, this Court has held that issues regarding parental rights to visitation involve fundamental constitutional rights. *See Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶39-44. Ms. Fekadu’s Due Process rights were violated when she was precluded from intervening in litigation that determined the care, custody, and control of her children. Ms. Fekadu presented the Eighth District with a valid Combined Motion in the Writ proceedings;

however, the Eighth District denied her Motion without explanation and in doing so violated her Due Process rights. (App. 4).

Ms. Fekadu was entitled to intervene in the original Writ action. *See, e.g., State ex rel. Cooker Restaurant Corp. v. Montgomery County Bd. of Elec.*, 80 Ohio St.3d 302, 304, 1997-Ohio-315, 686 N.E.2d 238, 240; *State ex rel. Rootstown Loc. Sch. Dist. Bd. of Educ. v. Portage County Court of Common Pleas*, 78 Ohio St.3d 489, 490, 678 N.E.2d 1365, 1366 (1997). While prohibition actions are brought solely against those who exercise judicial or quasi-judicial power, non-public individuals can still seek to join the proceedings when their rights are at stake. *Department of Admin. Servs. v. State Employ. Rels. Bd.*, 54 Ohio St.3d 48, 51, 1997-562 N.E.2d 125, 128 (1990). As the court in *Schucker v. Metcalf*, 10th Dist. No. 84AP-548, 1984 Ohio App. LEXIS 11652, \*3-5 (Nov. 15, 1984), *rev'd on otr. grds.*, 22 Ohio St.3d 33, 488 N.E.2d 210 (1986), explained:

Prohibition is a civil action. Intervention, as described by Civ. R. 24, is not clearly inapplicable to prohibition since there is as much reason for persons who will be affected by a prohibition action to be represented in the action as in other civil actions. In fact, there may be more reason for intervention of affected persons in a prohibition action since the action is directed against a judge who may not have adequate legal representation.

Ms. Fekadu sought to intervene in the Writ proceedings pursuant to Ohio Civil Rule of Procedure 24(A)(2) which provides, in pertinent part:

Upon timely application anyone shall be permitted to intervene in an action:

(2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and *the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest*, unless the applicant's interest is adequately represented by existing parties.

Civ. R. 24(A)(2) (emphasis added). Ohio courts hold that Civ. R. 24(A)(2) must be liberally construed in favor of intervention. *State Ex rel. LTV Steel Co. v. Gwin*, 594 N.E.2d 616, 619, 64

Ohio St.3d 245 (1992). “In determining whether to permit a post-judgment intervention, the courts have considered the following: the purpose for which intervention was sought; the necessity for intervention as a means of preserving the applicant's rights; and the probability of prejudice to those parties already in the case.” *Southern Ohio Coal Co. v. Paul Kidney, Chief, Division of Mines, et al.*, 100 Ohio App. 3d 661, 654 N.E.2d 1017 (4<sup>th</sup> Dist. 1995) (quoting *Norton v. Sanders*, 62 Ohio App.3d 39, 574 N.E.2d 552, (9th Dist. 1989) (citing Annotation, Timeliness of Application for Intervention As of Right Under Rule 24(a) of Federal Rules of Civil Procedure (1982), 57 A.L.R. Fed. 150, 205)). A lower court’s decision on the right of a party to intervene under Civ. R. 24(A)(2) is reviewed under an abuse of discretion standard, meaning that the lower court’s decision must be overturned if it is unreasonable, arbitrary, or implies an unconscionable attitude. *See State ex rel. First New Shiloh Baptist Church v. Meagher*, 82 Ohio St. 3d 501, 502, 696 N.E.2d 1058, (1998) fn. 1.

Ms. Fekadu demonstrated both a right to intervene under Civ. R. 24(A)(2), and that factors considered in permitting post-judgment intervention weighed in her favor. Initially, Ms. Fekadu’s Combined Motion was timely as it was submitted a mere week after Ms. Fekadu, and her counsel, learned that the Eighth District granted the Writ. Although N.G. commenced the action for the Writ on May 22, 2014, Ms. Fekadu did not learn of the Writ until after it was granted because neither N.G. nor his counsel notified Ms. Fekadu or her counsel of the Writ proceedings. Further, the Writ was captioned in a manner concealing N.G.’s identity such that Ms. Fekadu and her counsel would not know of, or have reason to know of, the pending action.

Ms. Fekadu demonstrated that she was entitled to intervene based on the facts relevant to the consideration of post-judgment intervention set forth in *Southern Ohio Coal Co.* First, Ms. Fekadu had a valid purpose for intervening in the action - both the best interests of her children

and her interest in parenting them. Second, Ms. Fekadu was uniquely situated to protect both her children's interests and her interest as their mother. Without intervention, her interests were not adequately represented by N.G., a wholly adverse party, or Judge Floyd, a neutral party with no relationship to Ms. Fekadu's children. Critically, neither N.G. nor Judge Floyd, at any time during the proceedings relating to the Writ, brought to the Eighth District's attention material facts that were necessary for the proper application of Ohio law and the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), such as N.G.'s falsified affidavit and the May 23, 2014 Order of Dismissal from the Virginia Litigation. Consequently, intervention was a necessary means for the pursuit of Ms. Fekadu's rights in a post-judgment context. Otherwise, Ms. Fekadu was unable to pursue a just resolution.

Third, and finally, there was no probability of prejudice to N.G. or Judge Floyd had the Eighth District allowed Ms. Fekadu's intervention. Ms. Fekadu was not presenting new or unknown evidence to the proceedings, but, rather, she was simply informing the Eighth District of existing issues dispositive to the matter that both existing parties had failed to raise. Moreover, N.G. should have reasonably expected Ms. Fekadu to take immediate action once she discovered the Writ proceedings, given the parties' litigious past.

The Eighth District abused its discretion when it denied Ms. Fekadu's motion to intervene. The Eighth District's decision was clearly unreasonable and arbitrary, especially in light of the fact that Ms. Fekadu's position for intervening was to offer previously omitted, albeit dispositive, evidence to the court. Ultimately, Ms. Fekadu demonstrated that she should have been permitted to intervene in the Writ proceedings. Her motion to intervene was timely, and her purpose for intervening was both valid and necessary. By prohibiting Ms. Fekadu from intervening, the Eighth District denied Ms. Fekadu's Due Process right to protect her

fundamental interest in her children's care, custody and management. Accordingly, the Eighth District's decision not to allow Ms. Fekadu to intervene should be overturned.

**PROPOSITION OF LAW NO. II:**

**IN THE ABSENCE OF FACTS SUPPORTING JURISDICTION OF ANOTHER STATE, SUCH STATE'S CUSTODY ORDERS ARE NOT ENTITLED TO FULL FAITH AND CREDIT.**

The Eighth District erred when it issued the Writ because it relied on the faulty conclusion that the Virginia court's June 5, 2012 custody order was entitled to full faith and credit. Despite faulting the Juvenile Court for not addressing "the factual dispute or attempt[ing] to determine the home state" of the children, the Eighth District failed to do the same when it issued the Writ. The Eighth District's reliance on the June 5, 2012 custody order was not reached after inquiry or investigation into the Virginia court's jurisdiction. Instead, the Eighth District merely assumed that Virginia had appropriate jurisdiction under the UCCJEA. This reasoning does not comport with the prerequisites attendant to the issuance of a writ of prohibition.

The Eighth District was entitled to grant the Writ only if N.G. demonstrated each prong of the following three-part test: (1) the Juvenile Court judge was about to exercise judicial power; (2) the exercise of judicial power by the Juvenile Court judge was not authorized by law, and (3) there existed no other adequate remedy in the ordinary course of law. *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005-Ohio-3804, 831 N.E.2d 1003, ¶14. The third element requiring proof of a lack of an adequate remedy at law is not necessary when the lack of judicial authority to act is patent and unambiguous. *Id.* at ¶16. Therefore, the dispositive issue for the Eighth District was whether the Juvenile Court *patently and unambiguously* lacked jurisdiction over Ms. Fekadu's custody action. It cannot be said that the Juvenile Court patently

and unambiguously lacked jurisdiction in this matter, when there was no inquiry into whether Virginia properly had jurisdiction to issue the June 5, 2012 custody order. Accordingly the Eighth District erred when it granted the Writ. Further, when there is a question of law regarding the existence of a juvenile court's subject matter jurisdiction, the appellate court reviews the matter de novo. *See In re K.R.J.*, 12th Dist. No. CA2010-01-012, 2010-Ohio-3953, ¶16.

Ohio adopted the UCCJEA, as codified in *R.C. 3127*, in 1995 to resolve jurisdiction disputes in child custody matters as was occurring under the former act, the Uniform Child Custody Jurisdiction Act ("UCCJA"). ***"The most significant change the UCCJEA makes to the UCCJA is giving jurisdictional priority and exclusive continuing jurisdiction to the home state."*** *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, 883 N.E.2d 420, ¶21. The UCCJEA guarantees that parents and children have a forum to resolve their disputes by preventing forum shopping or "jurisdictional competition." The UCCJEA ensures that a forum concerning custody issues will always be in existence, regardless of the parents' circumstances, such as a parent's choice to relocate to a different state. *See Mulatu v. Girsha*, 12th Dist. No. CA-2011-07-051, 2011 Ohio 6226, ¶15. The UCCJEA advances its primary purpose – to avoid jurisdictional competition – by conferring home-state jurisdiction to the state where the children were living within six months before the commencement of a child-custody proceeding. *See Rosen, supra.* at ¶41, *see also, United Tel. Credit Union v. Roberts*, 115 Ohio St.3d 464, 2007-Ohio-5247, 875 N.E.2d 927, ¶ 10 (court construes statutes to avoid unreasonable or absurd results). Further, if a child leaves his or her home state for less than six (6) months, this is considered a temporary absence under the UCCJEA and Ohio law, and the home state's jurisdiction remains. *See R.C. 3127.01(7)*.

This case exemplifies the need for enforcement of the UCCJEA’s clear-cut approach to home state jurisdiction. In granting the Writ, the Eighth District relied on *R.C. 3127.33(A)*, which provides that:

“[a] court of this state shall recognize and enforce a child custody determination of a court of another state if that state exercised jurisdiction in *substantial conformity with this chapter* or the *determination was made under factual circumstances meeting the jurisdictional standards of this chapter* and the determination has not been modified in accordance with this chapter.

(App. 66)

*R.C. 3127.15* governs the jurisdiction of Ohio courts to make an initial custody determination 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 ...

(App. 60-61)

As set forth above, *R.C. 3127.33(A)* instructs Ohio courts to “recognize and enforce a child custody determination of a court of another state *if that state exercised jurisdiction in substantial conformity with this chapter...*” *Id.* (App. 66, emphasis added). That is, Ohio courts should recognize child custody orders of another state only if that state is exercising jurisdiction consistent with the provisions in the UCCJEA.

There is little guidance under Ohio law regarding how to treat foreign state custody orders that were issued without jurisdiction. Other states have opined on the matter under similar circumstances. In *Malissa C. v. Matthew Wayne H.*, 193 P.3d 569 (N.M. Ct. App. 2008), the Court of Appeals for New Mexico was faced with an analogous situation where a father had omitted material facts from his affidavit in a Texas county court, while the child's mother submitted evidence to the New Mexico trial court showing that New Mexico was the home state. *Id.* The trial courts in Texas and New Mexico found home state jurisdiction existed in their respective states. On appeal, the New Mexico Court of Appeals underwent an analysis of whether Texas properly claimed home state jurisdiction. After finding that Texas did not, the court determined that it did not have to honor Texas's claims of home state jurisdiction or any custody orders stemming from those findings. *Id.* Further, courts around the country have reached similar conclusions. See *In re Marriage of Sareen*, 153 Cal. App.4th 371, 62 Cal. Rptr. 3d 687 (2007) (California court of appeals determined India did not have home state jurisdiction where children had resided there less than ten (10) months); see also *Welch-Doden v. Roberts*, 202 Ariz. 201, 42 P.3d 1166, 1168, 1176 (Ariz. Ct. App. 2002) (concluding that the Arizona court, where first custody proceeding was filed, did not have jurisdiction substantially in conformity with the UCCJEA because Arizona was not the child's home state and must defer to the court in Oklahoma, which was the child's home state).

Cases from other jurisdictions that have applied the UCCJEA show that a court confronted with a child-custody proceeding in a court of another state must determine whether the other court had jurisdiction substantially in conformity with the UCCJEA. In this instance, the Eighth District wrongly presumed that Virginia correctly determined jurisdiction in its decision to grant the Writ. (App.50). In Footnote 2 of the Opinion, the Eighth District wrote,

Presuming regularity, the Virginia court obviously resolved the factual dispute between the parties over where the children had been living in relator's favor and there is no indication that mother ever challenged or appealed that ruling in Virginia.

*Id.* at ¶15 n.2.

This presumption is erroneous and made in spite of evidence to the contrary. The Circuit Court of Arlington County issued an Order of Dismissal dated May 23, 2014, wherein the court dismissed all litigation in Virginia due to Ohio's finding of home state jurisdiction. (App. 38-39). The May 23, 2014 Order of Dismissal **specifically references** Ms. Fekadu's appeal of the June 5, 2012 Custody Order, thereby directly contradicting the Eighth District's assumption that she never appealed Virginia's initial custody order. The Father failed to include a copy of this Order of Dismissal or otherwise reference it in his pleadings. The Eighth District should have known that Ms. Fekadu, in fact, challenged the ruling in Virginia because she attached a copy of the May 23, 2014 Order of Dismissal to her Combined Motion. Furthermore, the Eighth District assumed that the children had been living in Arlington for at least six (6) months, despite the fact that Ms. Fekadu provided the Eighth District with notice of this faulty conclusion in her Combined Motion. She also attached additional evidence<sup>2</sup> to her Motion proving that the children only lived in Arlington for five and a half (5½) months and thereby showing that the children were only temporarily absent from Ohio. Thus, Ohio, not Virginia, was the children's

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<sup>2</sup> N.G. filed an Emergency Motion to Enforce the June 5, 2012 custody order, which the Arlington County Domestic Relations Court granted on September 9, 2014, thereby disregarding the Circuit Court's Dismissal Order. Ms. Fekadu filed an Emergency Appeal in Virginia seeking to have the Emergency Motion to Enforce dismissed by the Circuit Court. In support of her assertion in the Combined Motion in the Eighth District that N.G. lied in his affidavit, Ms. Fekadu attached Virginia Counsel's Memorandum in Support of the Emergency Appeal, detailing the significance of N.G.'s fraudulent testimony. (Supp. 35).

home state at the time the June 5, 2012 custody order was granted. Notwithstanding this, the Eighth District denied the Combined Motion, and in doing so wrongly upheld the Writ.

Given the importance of the UCCJEA's uniform application, it is paramount that Ohio courts pay the closest attention to determining what state appropriately has home state jurisdiction. The Eighth District's allowance of the Writ sets a dangerous precedent in Ohio, and beyond. Examining courts should not be permitted to merely assume that other states have correctly asserted jurisdiction. This is at odds with both the primary purpose of the UCCJEA and case law interpreting it. Allowing the results in this case to stand poses a threat to the integrity of the UCCJEA and the consistent application of Ohio law. Therefore, the Juvenile Court's finding that Ohio is the home state of the children should be enforced, as the June 5, 2012 custody order was issued without jurisdiction and is not entitled to full faith and credit by Ohio courts. Because of this, the Eighth District's Writ must be overturned. The Juvenile Court did not patently and unambiguously lack jurisdiction over this matter.

**PROPOSITION OF LAW NO. III:**

**AN INTERVENING PARTY IS ENTITLED TO RELIEF FROM A WRIT OF PROHIBITION WHERE THE PARTY HAS SHOWN THAT THE WRIT WAS GRANTED AS A RESULT OF FRAUD.**

Ohio Civil Rule of Procedure 60(B)(3) provides relief from judgment as follows:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:...(3) **fraud** (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party...The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.

Civ. R. 60(B)(3) (emphasis added). The Supreme Court in *GTE Automatic Electric, Inc. v. ARC Industries* (1976), 47 Ohio St.2d 146 articulated the standard which must be met when seeking relief under Civ. R. 60(B). Specifically, the Court held that:

To prevail on his motion under Civ. R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); (3) the motion is made within a reasonable time [...].

*Id.* at 150. Moreover, it is a well-settled proposition that cases should be decided on their merits.

*Id.* at 151. Because the issue addressed in Ms. Fekadu's 60(B) motion was ultimately whether the Juvenile Court had subject matter jurisdiction, the standard of review on appeal is *de novo*. See *In re H.P., et al.*, 8<sup>th</sup> Dist. No 101781, 2015-Ohio-1309, ¶15, citing *In re K.R.J.*, 12<sup>th</sup> Dist. No. CA-2010-01-012, 2010-Ohio-3953, ¶16 (appellate court conducted *de novo* review of a lower court's denial of a motion to vacate a custody order, where the issues was whether the trial court had subject matter jurisdiction under the UCCJEA).

Ms. Fekadu met each of the above three criterion, and as such was entitled to relief from the Writ. The first criterion contained in *GTE*, that a party has a meritorious defense or claim to present, is met in this case. In proving a meritorious claim, a movant need not prove that she will prevail on the meritorious claim. *Colley v. Bazell*, 64 Ohio St.2d 243, 247, 416 N.E.2d 605 (1980) fn.3; *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988). Rather, the allegation of a meritorious defense satisfies this criterion. *Rafalski v. Oates*, 17 Ohio App.3d 65, 477 N.E.2d 1212 (8<sup>th</sup> Dist. 1984). Ms. Fekadu alleged in her Combined Motion that N.G. lied in an affidavit submitted to the Juvenile Court, and that he withheld material facts from the Eighth District when he filed his Complaint for the Writ. (Supp. 23). Ms. Fekadu also asserted that she had meritorious defenses to the allegations made in the Writ.

Ms. Fekadu has satisfied the second criterion in *GTE*, which entitles a party to relief from judgment if she can show “the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5).” Ms. Fekadu demonstrated to the Eighth District that N.G. obtained the Writ due to fraud, misrepresentations and other misconduct. Yet, even in the face of evidence that N.G. obtained relief through the Writ on the basis of false statements regarding the children’s residency, and that he withheld an Order of Dismissal from the Virginia court, the Eighth District *still* granted the Writ and assumed that Virginia was properly exercising jurisdiction. (App. 4). Finally, Ms. Fekadu satisfied the third *GTE* criterion in that her motion was made within a reasonable time, as discussed more fully above.

As set forth above, N.G. engaged in fraud by presenting a false affidavit in pursuit of his dismissal of the Ohio Litigation and failed to inform this Court of the May 23, 2014 Order of Dismissal in the Virginia Litigation. Due to N.G.’s omission of material facts that were dispositive as to the Eighth District’s application of Ohio law and the UCCJEA, Ms. Fekadu has demonstrated an entitlement, pursuant to Civ. R. 60(B), to relief from this the Eighth District’s grant of the Writ.

### **CONCLUSION**

The Eighth District’s decision in this case is fundamentally wrong in both its reasoning and its factual findings. Critically, the Eighth District denied Ms. Fekadu’s Combined Motion to both intervene and be granted relief from the Writ and in doing so allowed the Writ to stand, even though Ms. Fekadu presented the Eighth District with evidence that N.G. misrepresented material facts in his pleadings. If not reversed, the Eighth District’s decision has dangerous implications for the consistent application of the UCCJEA and Ohio law. It will stand for precisely what the UCCJEA was enacted to avoid, which is the ability of one parent to

manipulate the law to his advantage in a custody dispute. Therefore, the Eighth District's decision in this regard must be reversed. Only a reversal will promote the indispensable purpose of the UCCJEA and corresponding Ohio law, and allow for a fair custody determination in this matter.

Respectfully submitted,

/s/ Robert J. Dubyak  
Robert J. Dubyak (0059869) (Counsel of Record)  
Christina C. Spallina (0088548)  
**Dubyak Nelson, LLC**  
6105 Parkland Boulevard, Suite 230  
Mayfield Heights, OH 44124  
PH: 216-364-0500 | FX: 216-364-0505  
Email: [rdubyak@dubyaknelson.com](mailto:rdubyak@dubyaknelson.com)  
[cspallina@dubyaknelson.com](mailto:cspallina@dubyaknelson.com)

**Counsel for Appellant Senayt Fekadu**

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing *Merit Brief of Appellant Senayt Fekadu* was served upon Brian C. Nelson, Esq., Counsel of Record for Appellee, 9 Corporation Center, Broadview Hts., Ohio 44147, by placing a true copy hereof in the ordinary U.S. mail, postage prepaid, on May 5, 2015.

/s/ Robert J. Dubyak  
Robert J. Dubyak (0059869)

# APPENDIX



**Notice of Appeal of Appellant Senayt Fekadu**

Appellant Senayt Fekadu hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. CA-14-101425.

This case is one of public or great general interest, and involves a substantial constitutional question.

Respectfully submitted,

Dated: March 2, 2015

/s/ Robert J. Dubyak  
Robert J. Dubyak (0059869)  
Christina C. Spallina (0088548)  
**DUBYAK NELSON, LLC**  
6105 Parkland Boulevard, Suite 230  
Mayfield Heights, OH 44124  
PH: 216-364-0500 | FX: 216-364-0505  
Email: [rdubyak@dubyaknelson.com](mailto:rdubyak@dubyaknelson.com)  
[cspallina@dubyaknelson.com](mailto:cspallina@dubyaknelson.com)  
**Attorneys for Appellant Senayt Fekadu**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2<sup>nd</sup> day of March, 2015, the foregoing *Notice of Appeal of Appellant Senayt Fekadu* has been served upon the following by placing a true copy hereof in the ordinary U.S. mail, postage prepaid:

Brian C. Nelsen, Esq.  
Richard W. Landoll, Esq.  
9 Corporation Center  
Broadview Hts., OH 44147  
**Attorneys for Appellee S/O Ex Rel., N.G**

/s/ Robert J. Dubyak  
Robert J. Dubyak (0059869)

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Kelley A. Sweeney, Clerk of Courts

S/O EX REL., N.G.

Relator

COA NO.  
101425

ORIGINAL ACTION

-vs-

CUY. CTY. CT./COMM PLEAS, JUV. DIV. ETAL.

Respondent

MOTION NO. 479610

Date 01/14/15

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## Journal Entry

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Combined motion to intervene as respondent S.F. and emergency motion for relief from order is denied. On September 9, 2014, the Juvenile and Domestic Relations District Court of Arlington County, Virginia issued a final order enforcing its June 5, 2012 custody order, which was the initial custody determination. S.F. has appealed that ruling to the Circuit Court of Arlington County, Virginia. The evidence presented to this court reflects a dispute among the parties as to whether the June 5, 2012 order is in force or was vacated by the Circuit Court's order dated May 23, 2014. This dispute is best resolved by the Circuit Court that issued the May 23, 2014 order. The Circuit Court of Arlington County, Virginia has stayed the appeal but ordered the children to remain in Virginia in physical custody of relator. The custody order was not stayed or modified or expressly vacated. Therefore, the June 5, 2012 custody order and the September 9, 2014 order enforcing it, are entitled to full faith and credit unless vacated, stayed, or modified by a court having jurisdiction to do so. R.C. 3127.43; R.C. 3127.20; State ex rel. Morenz v. Kerr, 104 Ohio St.3d 148, 2004-Ohio-6208, 818 N.E.2d 1162. In the event that the Virginia appellate courts vacate, modify or stay the custody orders, that could trigger jurisdiction back in the Ohio juvenile court cases again. Until such time, the Ohio juvenile court does not have jurisdiction to proceed.

RECEIVED FOR FILING

JAN 14 2015

CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
By \_\_\_\_\_ Deputy

Presiding Judge MARY J. BOYLE, Dissents

Judge SEAN C. GALLAGHER, Concur

  
KENNETH A. ROCCO  
Judge

CA14101425



87520513

APP-000004

COURT OF COMMON PLEAS, JUVENILE DIVISION  
CUYAHOGA COUNTY, OHIO

CASE NO: PR12703234

JUDGE: ALISON L. FLOYD

JOURNAL ENTRY  
PATERNITY - FINAL PATERNITY AND  
SUPPORT ORDER

In re: E█████ G█████

S█████ F█████, Plaintiff/Mother

vs

N█████ G█████, Defendant/Alleged Father

This matter came for hearing on May 25, 2012 before this Court regarding a Complaint to Establish the Parent-Child Relationship with an application to determine custody and order for the allocation of parental rights and responsibilities filed on February 27, 2012 by Attorney Richard Rabb, counsel for mother.

The Court finds that the following parties were present this day in court: N█████ G█████, Father; Richard Rabb, Counsel for S█████ F█████; Brian C. Nelsen, Counsel for N█████ G█████; S█████ F█████, Mother.

Notices for these proceedings were issued by ordinary mail to all necessary parties. No Notice has been returned undelivered.

Pursuant to Civil Rule 12(B)(1) and in consultation with the assigned Judge from the State of Virginia, and review of all pleadings before each court, the Court finds that there is reasonable cause to believe that the child resided in the State of Virginia more than six months prior to the commencement of the action herein; that the alleged father acknowledges paternity before the Virginia Court; and that based on the significant contacts that the child has had in the State of Virginia, the Court can reasonable infer that the Virginia Court would be a court of competent jurisdiction.

THEREFORE, it is the Decision of the Court, having reviewed this matter with the Jurist of the other court, that the State of Virginia is the home state of the child; and that this matter may proceed expediently before the Virginia Court, this court finds that said expediency would serve the best interest of the child, child's sibling, and the family.

It is ordered that the Complaint to Establish Parent-Child Relationship and Application to Determine Custody herein is dismissed for lack of jurisdiction. Matter to proceed before the Virginia Court as scheduled and noticed to the parties. Hearing on July 24, 2012 is canceled.

It is further ordered that the Court costs for these proceedings are waived.



---

Judge Alison L. Floyd  
May 29, 2012

**Notice to the Parties: Pursuant to Rule 34(J) of the Rules of Juvenile Procedure and Rules 3 and 4 of the Ohio Rules of Appellate Procedure, an appeal of the order herein may be taken to the Eighth District Court of Appeals by filing a Notice of Appeal with the Clerk of the trial court within thirty days of the entry of the judgment or final order. Failure to file a timely Notice of Appeal may result in the dismissal of the appeal.**

**Filed with the clerk and journalized by Cuyahoga County Juvenile Court Clerks Office,  
Volume 59, Page 3670, May 29, 2012, cjsmw**

COURT OF COMMON PLEAS, JUVENILE DIVISION  
CUYAHOGA COUNTY, OHIO

CASE NO: PR12703235  
JUDGE: ALISON L. FLOYD

JOURNAL ENTRY

In re: Y█████ G█████

S█████ F█████, Plaintiff/Mother

vs

N█████ G█████, Defendant/Alleged Father

This matter came for hearing on May 25, 2012 before this Court regarding a Complaint to Establish the Parent-Child Relationship with an application to determine custody and order for the allocation of parental rights and responsibilities filed on February 27, 2012 by Attorney Richard Rabb, counsel for mother.

The Court finds that the following parties were present this day in court: N█████ G█████, Father; Richard Rabb, Counsel for S█████ F█████; Brian C. Nelsen, Counsel for N█████ G█████; S█████ F█████, Mother.

Notices for these proceedings were issued by ordinary mail to all necessary parties. No Notice has been returned undelivered.

Pursuant to Civil Rule 12(B)(1) and in consultation with the assigned Judge from the State of Virginia, and review of all pleadings before each court, the Court finds that there is reasonable cause to believe that the child resided in the State of Virginia more than six months prior to the commencement of the action herein; that the alleged father acknowledges paternity before the Virginia Court; and that based on the significant contacts that the child has had in the State of Virginia, the Court can reasonable infer that the Virginia Court would be a court of competent jurisdiction.

THEREFORE, it is the Decision of the Court, having reviewed this matter with the Jurist of the other court, that the State of Virginia is the home state of the child; and that this matter may proceed expediently before the Virginia Court, this court finds that said expediency would serve the best interest of the child, child's sibling, and the family.

It is ordered that the Complaint to Establish Parent-Child Relationship and Application to Determine Custody herein is dismissed for lack of jurisdiction. Matter to proceed before the Virginia Court as scheduled and noticed to the parties. Hearing on July 24, 2012 is canceled.

It is further ordered that the Court costs for these proceedings are waived.



---

Judge Alison L. Floyd  
May 29, 2012

**Notice to the Parties: Pursuant to Rule 34(J) of the Rules of Juvenile Procedure and Rules 3 and 4 of the Ohio Rules of Appellate Procedure, an appeal of the order herein may be taken to the Eighth District Court of Appeals by filing a Notice of Appeal with the Clerk of the trial court within thirty days of the entry of the judgment or final order. Failure to file a timely Notice of Appeal may result in the dismissal of the appeal.**

**Filed with the clerk and journalized by Cuyahoga County Juvenile Court Clerks Office,  
Volume 59, Page 3649, May 29, 2012, cjkah**

COURT OF COMMON PLEAS, JUVENILE DIVISION  
CUYAHOGA COUNTY, OHIO

IN THE MATTER OF: EMNET GEBREYES

CASE NO: PR12703234  
JUDGE: ALISON L. FLOYD

JOURNAL ENTRY

This matter came on for consideration this 8<sup>th</sup> day of June, 2012 before the Honorable Judge Alison L. Floyd regarding a Motion for reconsideration and request for hearing filed by mother through counsel on May 25, 2012.

This Court finds that the motions are not well taken and are hereby denied. Mother should present her jurisdictional challenge to the Virginia Court.

It is therefore ordered that the court's order dismissing the complaint to establish a parent-child relationship without prejudice is continued in effect without further hearing.



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Judge Alison L. Floyd  
June 11, 2012

**Notice to the Parties: Pursuant to Rule 34(J) of the Rules of Juvenile Procedure and Rules 3 and 4 of the Ohio Rules of Appellate Procedure, an appeal of the order herein may be taken to the Eighth District Court of Appeals by filing a Notice of Appeal with the Clerk of the trial court within thirty days of the entry of the judgment or final order. Failure to file a timely Notice of Appeal may result in the dismissal of the appeal.**

**Filed with the clerk and journalized by Cuyahoga County Juvenile Court Clerks Office,  
Volume 60, Page 919, June 14, 2012, cjsmw**

ORDER FOR CUSTODY/VISITATION  
GRANTED TO INDIVIDUAL(S)

Commonwealth of Virginia VA. CODE §§ 16.1-278.15, 20-124.2

Case No. 0863-01-00

06/05/2012

DATE OF HEARING

ARLINGTON J&DR COURT

Juvenile and Domestic Relations District Court

In re: [REDACTED] NECA SI E.N.G  
NAME OF CHILD

05/18/2009

DATE OF BIRTH

Present: [X] Father [REDACTED] SI N.G  
[X] Mother FE [REDACTED] SP  
[ ] Child  
[ ] Other  
[ ] Other  
[X] Father's attorney DANNENBAUM, DANIEL  
[X] Mother's attorney MAYS  
[ ] Guardian ad litem  
[ ] Attorney  
[ ] Attorney

The above-named child has been brought before this Court upon the filing of a written petition or motion concerning custody or visitation or for which transfer of custody is a dispositional alternative. Legal notice has been given to all proper and necessary parties. All provisions of the Juvenile and Domestic Relations District Court Law have been duly complied with in assuming jurisdiction over the child, and all determinations have been made in accordance with the standards set forth in Virginia Code § 16.1-278.4, § 16.1-278.5, § 16.1-278.6 or § 16.1-278.8 or § 16.1-278.15 and §§ 20-124.1 through 20-124.10.

HAVING CONSIDERED ALL RELEVANT AND MATERIAL EVIDENCE PRESENTED AND THE BEST INTEREST OF THE CHILD, THE COURT FINDS THAT THE CHILD IS WITHIN THE JURISDICTION OF THIS COURT AND FURTHER FINDS AND ORDERS THAT:

- 1. [ ] The parties are in agreement on the arrangement for the child's custody and visitation:  
[ ] as set forth in the agreement dated ..... which is incorporated by reference.  
[ ] as set forth in the attached document ..... which is incorporated.  
[X] as set forth below.
- 2. Custody/Visitation E.N.G  
JOINT LEGAL CUSTODY OF [REDACTED] IS HEREBY GRANTED WITH THE PARENTS WITH PRIMARY PHYSICAL CUSTODY WITH THE FATHER. LIBERAL VISTATION WITH THE MOTHER AND HALF OF THE SUMMER VACATION.

The basis for the decision determining custody or visitation has been communicated to the parties orally or in writing.

- 3. [ ] A supplemental sheet with additional findings and/or orders is attached and incorporated.
- 4. Relocation. Each party intending a change of address shall give 30 days advance written notice of such change of address to the court and other party, pursuant to Virginia Code § 20-124.5. Unless otherwise provided in this order, this notice shall contain the child's full name; the case number of this case, the party's new telephone number and new street address and, if different, the party's new mailing address. Unless otherwise provided in this order, the notice shall be mailed by first-class or delivered to this court and to the other party.
- 5. Access to Records. In accordance with Virginia Code § 20-124.6, neither parent, regardless of whether such parent has custody, shall be denied access to the academic or health records of that parent's minor child, unless otherwise provided in this order or, in the case of health records, if the minor's treating physician or clinical psychologist has made a part of the child's health record a written statement that furnishing to or review by the parent of such health records would be reasonably likely to cause substantial harm to the minor or another person.
- 6. [ ] Deployed Military Parents and Guardians. In accordance with § 20-124.10, the nondeploying parent or guardian shall reasonably accommodate the leave schedule of the deploying parent or guardian, (ii) the nondeploying parent shall facilitate opportunities for telephonic and electronic mail contact between the deploying parent or guardian and the child during the deployment period, and (iii) the deploying parent or guardian shall provide timely information regarding his leave schedule to the nondeploying parent or guardian.
- 7. This Order is [X] FINAL [ ] TEMPORARY and a final hearing on this matter will be held on

07/13/2012

11:00 AM

DATE

TIME

06/05/2012

DATE

JUDGE

FORM DC-573 (MASTER PAGE ONE OF 2) 07/08

CC: FATHER: MAYS, ESQ.

Electronically Filed 11/07/2014 16:45 / FILING OTHER THAN MOTION / CA 14 101425 / Confirmation Nbr. 280204 / CLCXP

APP-000010

COMMONWEALTH OF VIRGINIA  
ARLINGTON JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT  
1425 N. COURTHOUSE ROAD, 4<sup>TH</sup> FLOOR, ARLINGTON, VA 22201

ORDER / RECORD OF PROCEEDINGS

ENG

DOCKET NO. J-36862-04-V  
OFFENSE / CAUSE VISITATION custody  
COURT DATE 06/05/2012

PARTIES PRESENT:

Juvenile Age \_\_\_\_\_  Attorney \_\_\_\_\_  Other \_\_\_\_\_  
 Petitioner / Complainant father 42  Attorney Dannenberg  
 Respondent / Defendant mother 33  Attorney Mays  
 Probation Counselor \_\_\_\_\_  Guardian ad litem \_\_\_\_\_  
 Interpreter  Mother  Father  Family \_\_\_\_\_  
 Commonwealth Attorney \_\_\_\_\_  County/DCSE Attorney \_\_\_\_\_

TYPE OF HEARING:

Advisory / Arraignment  Bond / Detention Hearing  Foster Care Review  
 Adjudication / Trial  Preliminary / Transfer  Disposition / Sentencing  
 Probation Violation  Show Cause  Review / Motion 1230 to 515

IT IS ORDERED THAT / THE FINDINGS OF THE COURT ARE AS FOLLOWS:

Motion to continue to date to Ohio denied

father testified he lives in and from Va - WHS, ICW, VPI, real estate, works from home

2400 400TH, requests physical custody of children

mother testified she has Ohio tax business 200,000 and Little Census in Cleveland/Ash

her family is close, she supports, good health, competent businesswoman and mother

Joint legal primary phys w/ father and lib visitation w/ mother to include 1/2 of the summer

Final Order entered today

THIS CASE IS CONTINUED TO July 13 AT 11 - FOR Review of custody  
ATTORNEY APPOINTED \_\_\_\_\_  
GAL APPOINTED \_\_\_\_\_  
FEE AWARDED / ASSESSED \_\_\_\_\_

J. Vout  
JI

INTERPRETER NEEDED \_\_\_\_\_  
DATE SCHEDULED \_\_\_\_\_  
COURT COSTS TO BE PAID IN \_\_\_\_\_ DAYS / MONTHS

JDR GREENSHEET 9/05 \*3985

FILE REVIEWED BY: CLERK [Signature] HI: 61512 JDR old



7/15/13

VIRGINIA

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

██████████ N.G. :

Plaintiff :

v. :

: Case No. CJ 12-59; 12-61; 12-62

██████████ S.F. :

Defendant :

**VISITATION ORDER**

ON THE 20<sup>TH</sup> DAY OF FEBRUARY, 2013, came the parties, with their counsel, (1) upon the appeal of the Order of Custody from the Juvenile and Domestic Relations Court dated June 5, 2012, (2) upon the Order of the Juvenile and Domestic Relations Court dated August 20, 2012, which established visitation only through the hearing on February 20, 2013; and (3) upon the Defendant's oral Motion to Stay; and it

**APPEARING TO THE COURT** that the Defendant ("Mother") appealed a decision of the Cuyahoga County, Ohio Juvenile Court dated May 25, 2012 dismissing Mother's custody petition so that matters pertaining to custody would proceed in Virginia; and It further

**APPEARING TO THE COURT** that a decision by the Court of Appeals of Ohio dated February 14, 2013 reversed and remanded the Ohio trial court's ruling and directed the trial court to hold an evidentiary hearing to

Order, ██████████ Secretary  
2 | Page

determine whether Ohio or Virginia is the "home state" of the children. Accordingly, the issue of whether Virginia has subject matter jurisdiction at this point in time is unresolved; and it further

**APPEARING TO THE COURT** that visitation is properly before this Court and a visitation order needs to be entered to address visitation beyond today's date since the existing visitation order by the Juvenile and Domestic Relations Court does not go beyond this date; and it further

**APPEARING TO THE COURT** that the parties have reached a partial agreement on visitation and submitted the issue of transportation and international travel to the Court for adjudication; it is therefore

**ADJUDGED, ORDERED and DECREED** that the custody appeal in this Court is stayed until further order. The Order of the Juvenile and Domestic Relations Court dated June 5, 2012 shall remain in full force and effect during the stay; and it is further

**ADJUDGED, ORDERED and DECREED** that the Mother shall be entitled to weekend visitation beginning March 8, 2013 pursuant to the schedule below. A weekend shall be defined as starting on Friday at 5:00 p.m. and going until Sunday at 7:00 p.m. except during the times the children are with her in Ohio and the Father picks up the children by automobile in Ohio, at which time it would end at 2:00 p.m. when he would pick up the children at the Mother's home in Ohio. One weekend shall be

Order, [REDACTED]  
2 | Page

spent in the northern Virginia/DC area and one weekend may be spent in the Cleveland, Ohio area at the option of the Mother. Should the Mother elect to take the children somewhere other than her home in Cleveland, Ohio, she shall provide the Father with one (1) week notice of such travel, and in no event shall her election impose any additional obligation with respect to the Father's transportation obligations as set forth herein. The Mother's weekend schedule between now and the summer is as follows:

March 8-10: in Virginia

March 22-27 at noon: in Ohio

April 12-14: in Virginia

April 26-28: in Ohio

May 10-12: in Virginia

May 24-27 (Memorial Day weekend): in Ohio

June 14-16: in Virginia

The Mother shall pick the children up and return them to the Father's residence on all weekends she exercises visitation in Virginia. On the weekends she exercises out-of-town visitation, the Father shall be responsible for transporting the children back to Virginia from the Mother's home in Cleveland, Ohio and picking up the children from the Mother's residence at 2:00 p.m. on Sunday. Should the Father choose air travel to

Order, February 2014  
3 | Page

pick up the children, the Father shall notify the Mother at least 3 days in advance so as to allow any adjustments to the pick-up time, which in no event shall be earlier than 2 p.m. or later than 7:00 p.m. on that Sunday. The parties shall set the weekend schedule for the next school year by August 15, 2013; and it is further

**ADJUDGED, ORDERED and DECREED** that the parties shall each have summer visitation with the children for three uninterrupted weeks at a time. Summer shall be defined as June 23, 2013 (Sunday) until three days prior to school commencing, which is September 3, 2013. The Mother shall have the first three week rotation from June 23<sup>rd</sup> to July 14<sup>th</sup> at 2:00 p.m. The Father shall have the next 3 week rotation until August 5<sup>th</sup> at 2:00 p.m. The Mother shall then have the next 3 week rotation to August 29<sup>th</sup> at 2:00 p.m., which includes an additional 3 days pursuant to the provision below, in that school does not begin until September 3<sup>rd</sup>. It is acknowledged that whoever has the last three week rotation may have his/her time cut short due to the children having to be back to their residence in Virginia three days prior to school starting. Conversely, if there is more than three days between the end of the last rotation and the start of school, that time shall be divided equally between the parties, with the provision that the children need to be back to their Virginia residence three days prior to school starting. The Father shall be responsible for the

Order, ~~\_\_\_\_\_~~  
4 | Page

Sunday pickup from the Mother's residence in Cleveland, OH for the July 14, 2013 and the August 29<sup>th</sup> transitions; and it is further

**ADJUDGED, ORDERED and DECREED** that the parties shall split spring break, with the Mother having March 22-27, 2013 at noon and the Father having the remainder of the spring break.

**ADJUDGED, ORDERED and DECREED** that the Father shall have Thanksgiving for 2013 to be defined as from the time school lets out prior to the Thanksgiving holiday until the Sunday following Thanksgiving; and it is further

**ADJUDGED, ORDERED and DECREED** that the parties shall split the winter break, with the Father having the first half in 2013 and the Mother having the second half and alternating thereafter. The first half shall be defined as from the time school lets out for the winter break until noon December 27<sup>th</sup>, and the second half shall be defined as from noon December 27<sup>th</sup> until 7:00 p.m. the day prior to school resuming; and it is further

**ADJUDGED, ORDERED and DECREED** that the Father shall execute the necessary documents in order for the child Emnet to obtain a passport within one (1) week of the entry of this Order. The Father shall be the custodian of the children's passports, and shall release them to the Mother prior to the travel date provided she provides an itinerary.

Order, [REDACTED]  
5 | Page

Thereafter, after flight arrangements have been made, the Mother shall provide proof of purchase of flights and information regarding any hotels for any planned international travel. International travel shall not occur during regular weekend visitations and shall be restricted to summer visitation. The parties shall provide a detailed Itinerary of their international travel with the children, to include not only arrival and departure dates and city, but any planned travel to other countries while abroad with the children. The parent not traveling may speak with the children daily while the other parent is abroad with them and they shall provide a method of communication, e.g. Phone number or Skype. The parties shall not be permitted to travel with the children to any country that has been issued a State Department Travel Warning. The parties shall ensure that the children receive all of the appropriate shots prior to any such international travel. Passports shall only be released to the Mother once proof is given that the children have received any such shots. The parties shall not leave the children alone with any third parties with whom they are not previously familiar for more than one overnight during the duration of their travels.

**ADJUDGED, ORDERED and DECREED** that the Mother may exercise visitation with the children on any days she does not have prescribed visitation time provided she give 24 hours' notice to the Father and the parties mutually agree.

Order, Filed [REDACTED]  
6 | Page

THIS CAUSE IS CONTINUED

Entered this 15<sup>th</sup> day of, July 2013.

  
\_\_\_\_\_  
Judge, Arlington County Circuit Court

SEEN AND OBJECTED to as to staying custody proceeding and to any international travel being permitted:

  
\_\_\_\_\_

DEMIAN J. MCGARRY, VSB # 70,199  
McGarry Law Firm, PLLC  
Counsel for Plaintiff  
500 North Washington Street, Suite 201  
Alexandria, Virginia 22314  
Tel: 571/482-5151, Fax: 571/482-5153  
dem@mcgarrylawfirm.com

SEEN AND SEE ATTACHED FAXED  
SIGNATURE PAGE WITH OBJECTIONS

PAUL R. SMOLLAR, VSB #28,428  
Kuder, Smollar & Friedman, P.C.  
1350 Connecticut Avenue, N.W.  
Suite 600  
Counsel for Defendant  
Washington, DC 20036  
Tel. 202.331.7522  
Fax. 202.331.0388  
psmollar@ksflaw.com

Order,   
7 | Page

**THIS CAUSE IS CONTINUED**

Entered this \_\_\_\_\_ day of, \_\_\_\_\_ 2013.

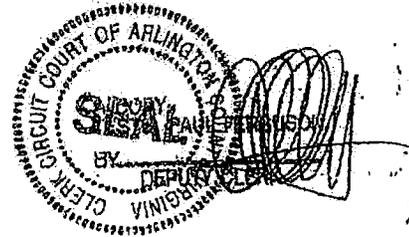
\_\_\_\_\_  
Judge, Arlington County Circuit Court

**SEEN AND OBJECTED to as to staying custody proceeding and to any international travel being permitted:**

\_\_\_\_\_  
**DEMIAN J. MCGARRY, VSB # 70,199**  
McGarry Law Firm, PLLC  
Counsel for Plaintiff  
500 North Washington Street, Suite 201  
Alexandria, Virginia 22314  
Tel: 571/482-5151, Fax: 571/571-5153  
dem@mcgarrylawfirm.com

*SEEN AND OBJECTED TO as to transition arrangements for visits involving picking up children and returning children to D.C. and as to any limitations on international travel.*

*Paul R. Smollar*  
\_\_\_\_\_  
**PAUL R. SMOLLAR, VSB #28,428**  
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Order, \_\_\_\_\_  
7 | Page

TOTAL P.08

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 98652

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IN RE: E.G., ET AL.

MINOR CHILDREN

[Appeal by S.F., Mother]

---

**JUDGMENT:  
REVERSED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Juvenile Division  
Case Nos. PR 12703234 and PR 12703235

**BEFORE:** Boyle, P.J., E.A. Gallagher, J., and Kilbane, J.

**RELEASED AND JOURNALIZED:** February 14, 2013

**ATTORNEYS FOR APPELLANT**

Robert J. Dubyak  
Joseph T. Gorman, Jr.  
Anthony J. Trzaska  
Dubyak Connick Sammon  
Thompson & Bloom, LLC  
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Cleveland, Ohio 44122-7341

**ATTORNEY FOR APPELLEE**

Brian C. Nelson  
9 Corporation Center  
Broadview Heights, Ohio 44147

FILED AND JOURNALIZED  
PER APP.R. 22(C)

FEB 14 2013

CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
By  Deputy

MARY J. BOYLE, P.J.:

{¶1} Plaintiff-appellant, S.F. (“mother”), appeals from a judgment of the Cuyahoga County Court of Common Pleas, Juvenile Division, denying her motion to reconsider its dismissal of her complaint to establish parent-child relationship. She raises two assignments of error for our review:

[1.] The trial court erred and abused its discretion in making its decision on jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act [“UCCJEA”], R.C. 3127.01 et seq., without a prior evidentiary hearing and a full explanation of the disputed facts essential to its determination.

[2.] The trial court erred and abused its discretion in dismissing Plaintiff’s Complaint for lack of subject matter jurisdiction despite evidence establishing that Ohio is, was, and always has been the home state of Plaintiff and the children.

{¶2} Finding merit to her appeal, we reverse the judgment of the trial court and remand.

#### Procedural History and Factual Background

{¶3} Mother filed a complaint to establish parent-child relationship in the Cuyahoga County Juvenile Court on February 27, 2012. In the complaint, mother asserted that she had two minor children, one born in 2007 and one born in 2009. Mother stated that although paternity had never been established, N.G. (“father”) was the natural father of the two minor children. Mother further stated that she and father were never married. In her UCCJEA affidavit,

mother averred that father lived in Virginia, but that the children had lived with her in Cleveland, Ohio since their respective births.

{¶4} On March 20, 2012, father filed a petition for custody in Virginia. Ten days later, father moved to dismiss mother's Ohio complaint for lack of subject matter jurisdiction pursuant to Civ.R. 12(B)(1), alleging that Virginia was the home state of the two minor children.

{¶5} On May 25, 2012, the Cuyahoga County Juvenile Court judge held a hearing with all parties and counsel present. The judge indicated that she had spoken to the Virginia judge presiding over father's custody action. The judge said that she learned from speaking with the Virginia judge that father had acknowledged paternity in the Virginia action. The judge informed the parties that based on the pleadings filed by father in Virginia, she believed that mother and father had a leasehold property in Virginia. The judge also indicated that the Virginia judge believed that it would be in the best interest of the children for the case to be decided in Virginia because the case would be finalized before the children began school in the fall, whereas in Ohio, the court indicated that it would take much longer to finalize the case. The judge then sua sponte dismissed mother's custody complaint "in accordance with the UCCJEA" for the matter to proceed in Virginia.

{¶6} In its judgment entry, the trial court stated:

Pursuant to Civ.R. 12(B)(1) and in consultation with the assigned judge from the state of Virginia, and review of all pleadings before each court, the court finds that there is reasonable cause to believe that the child resided in the state of Virginia more than six months prior to the commencement of the action herein; that the alleged father acknowledges paternity before the Virginia court; and that based on the significant contacts that the child has in the state of Virginia, the court can reasonably infer that the Virginia court would be a court of competent jurisdiction.

Therefore, it is the decision of the court, having reviewed this matter with the jurist of the other court, that the state of Virginia is the home state of the child; and that this matter may proceed expediently before the Virginia court, this court finds that said expediency would serve the best interest of the child, child's sibling, and the family.

{¶7} Subsequently, the trial court dismissed mother's complaint.

{¶8} Mother moved the trial court to reconsider its dismissal and requested an evidentiary hearing. The trial court denied mother's motion. Mother appeals the denial of her motion and the dismissal of her complaint.

#### Jurisdiction

{¶9} Normally, a trial court's decision regarding child custody issues are reviewed by an appellate court under the abuse of discretion standard. *Baxter v. Baxter*, 9th Dist. No. 10CA009927, 2011-Ohio-4034, ¶ 6, quoting *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). An appellate court, however, reviews issues relating to subject matter jurisdiction de novo, as such a determination is a matter of law. *In re K.R.J.*, 12th Dist. No. CA2010-01-012, 2010-Ohio-3953, ¶ 16.

{¶10} R.C. 2151.23(F)(1) authorizes a juvenile court to exercise jurisdiction in custody matters in accordance with R.C. 3127.01 to 3127.53 of the UCCJEA. As the title of the act suggests, R.C. Chapter 3127 sets forth a series of standards and definitions for determining when an Ohio court has jurisdiction, as opposed to a court of another state, to issue a child custody decision. The primary purpose of the UCCJEA is “to avoid jurisdictional competition and conflict with courts of other jurisdictions” in custody matters. *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 244, 2008-Ohio-853, 883 N.E.2d 420, ¶ 20, quoting *In re Palmer*, 12 Ohio St.3d 194, 196, 465 N.E.2d 1312 (1984). The UCCJEA gives “jurisdictional priority and exclusive continuing jurisdiction to the home state.” (Citation omitted.) *Id.* In order to strengthen the certainty of home-state jurisdiction, the UCCJEA eliminates the review of subjective factors, such as the child’s best interest, from the original jurisdictional inquiry that existed in the former version of the UCCJEA. *Id.* at ¶ 21. Further, R.C. 3127.15(A) “is the exclusive jurisdictional basis for making a child custody determination by a court of this state.” R.C. 3127.15(B).

{¶11} The UCCJEA, as codified in Ohio, provides four types of initial child-custody jurisdiction: (1) home-state jurisdiction, (2) significant-connection jurisdiction, (3) jurisdiction because of declination of jurisdiction, and (4) default jurisdiction. R.C. 3127.15(A)(1)-(4). *Rosen* at ¶ 31.

{¶12} Specifically, R.C. 3127.15(A) provides that, with exceptions not relevant here, a court in Ohio has jurisdiction to make an initial decision in a child custody proceeding only if one of the following applies: (1) (a) Ohio is the home state of the child on the date the proceeding commenced, or (b) Ohio was the home state of the child within six months before the proceeding's commencement, the child is absent from Ohio, and a parent or guardian continues to live in Ohio; (2) a court of another state does not have jurisdiction as the child's home state or a court of the child's home state has declined to exercise jurisdiction because Ohio is the more appropriate forum and both of the following are true: (a) the child and one of her parents has a "significant connection" with Ohio other than mere physical presence; and (b) substantial evidence is available in Ohio concerning her care, protection, training, and personal relationships; (3) all courts having jurisdiction as a home state or as a "significant connection" state have declined to exercise jurisdiction on the ground that a court of Ohio is the more appropriate forum; or (4) no court of any other state would have jurisdiction under (1), (2), or (3).

{¶13} R.C. 3127.01(B)(7) defines "home state" as the

state in which a child lived with a parent \* \* \* for at least six consecutive months immediately preceding the commencement of a child custody proceeding \* \* \*. A period of temporary absence of any of them is counted as part of the six-month or other period.

{¶14} Although R.C. 3127.01(B)(7) refers to “at least six consecutive months immediately preceding the commencement” of a child custody proceeding, the Ohio Supreme Court has held that for purposes of determining the child’s “home state” under the UCCJEA, the six-consecutive-month period includes not only the six months *immediately* preceding the commencement of a child custody proceeding, but can also occur “within” the six months before the commencement of the child custody proceeding. *See Rosen*, 117 Ohio St.3d 241, 2008-Ohio-853, 883 N.E.2d 420. Put another way, a child’s home state is where the child lived for six consecutive months ending within the six months before the child custody proceeding was commenced. *See id.* at ¶ 41-42 (Ohio Supreme Court granted father’s writ of prohibition to prevent an Ohio judge from proceeding on mother’s custody action that she filed four months after moving to Ohio with the children; the Supreme Court held that West Virginia was the children’s “home state” because they had only lived in Ohio for four months, but had lived in West Virginia for six consecutive months “within” the six-month period before the commencement of mother’s custody action.).

{¶15} R.C. 3127.09, entitled “Communications between courts,” governs communications between courts in different states regarding proceedings arising under R.C. 3127.01 to 3127.53. It provides that “a court of this state may communicate with a court of another state concerning” issues that arise under the UCCJEA. R.C. 3127.09(A). The statute also provides that the court may

give the parties the opportunity to participate in the communication, but it does not require such participation. See R.C. 3127.09(B). Further, the statute mandates that “a record shall be made” of this communication, except for matters concerning scheduling, calendars, and court records, and the parties shall be promptly informed of the communication and granted access to said record. R.C. 3127.09(C) and (D).

### Analysis

{¶ 16} Mother argues that Ohio is, and always has been, the children’s home state. She maintains that they were born at Lakewood Hospital and have lived with her in Cleveland, at the same address, since their respective births. She points to several facts establishing that her residence has always been in Ohio, including the fact that she has an Ohio driver’s license, her automobile has an Ohio title, she files Ohio and federal taxes as an Ohio resident, and she owns a tax-preparation business with several locations throughout the city of Cleveland, as well as a restaurant franchise in Cleveland.

{¶ 17} Mother explains in her affidavit opposing father’s motion to dismiss that, because her tax-preparation business is only busy during tax season, she has the ability to travel throughout the remainder of the year. As a result, she and the children travel to Virginia often to visit father and other friends and relatives. But she asserts that these visits were only “temporary absences” and that she returned monthly to her home during these absences.

{¶18} Conversely, father asserts in his motion to dismiss mother's Ohio complaint, that up until mother filed her complaint in Ohio, he and mother shared custody of the children and lived in both Virginia and Ohio. Father states that he and mother had an agreement that they would live primarily in Virginia once their oldest child reached the age of three and entered preschool. Prior to that, father avers that he and mother lived in Virginia during the summer and in Ohio during tax season. According to father, once the oldest child attained the age of three, the child entered preschool in Virginia, as they had planned. Father states that the children lived in Virginia from April 8, 2010 to December 23, 2010. He states that the children moved to Ohio on December 24, 2010 until April 23, 2011. He then claims that they returned to Virginia on April 24, 2011, where they lived until November 1, 2011, when mother brought them back to Ohio.

{¶19} According to father, when mother filed her custody complaint in Ohio, the children had only lived in Ohio for four months. Prior to that, they had lived in Virginia for over six consecutive months. Thus, father maintains that Virginia is the children's home state under the UCCJEA.

{¶20} After reviewing the record, we agree with mother that the trial court erred when it dismissed her complaint without holding an evidentiary hearing because the facts regarding where the children lived are in dispute. The trial court could not determine whether Ohio or Virginia was the children's "home

state” at the time mother filed her custody complaint in Ohio — not based on mother’s pleadings in Ohio or father’s pleadings in Virginia or their affidavits or by talking to the Virginia judge for that matter — because again, the facts are in dispute.

{¶21} If the trial court determines, after holding an evidentiary hearing, that the children did, in fact, live in Virginia from April 24, 2011 to November 1, 2011, as father claims they did, then the Cuyahoga County Juvenile Court lacks jurisdiction to determine the action because Virginia would be the children’s “home state” under the UCCJEA. *See Rosen*, 117 Ohio St.3d 241, 2008-Ohio-853, 883 N.E.2d 420.

{¶22} If, however, the trial court determines that the children lived in Ohio — with only “temporary absences” from home — then Ohio is the children’s “home state” for purposes of jurisdiction under the UCCJEA. We recognize that the statute does not define “temporary absence,” but common sense dictates that the plain meaning of “temporary absence” is leaving the state for short, limited time periods.<sup>1</sup> If the children left Ohio for six months or more — half of the year — that does not equate to a short, limited absence.

{¶23} Mother asserts that the children have significant connections to Ohio. But “significant connections” are only relevant when no other state has

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<sup>1</sup>“Temporary” is defined as “lasting for a limited time.” *American Heritage Dictionary* 843 (4th Ed.2001).

“home state” jurisdiction or the other state is the “home state,” but the court in the “home state” declined to exercise its jurisdiction because it determined it is not convenient to do so. *See* R.C. 3127.15(A)(2). Here, either Ohio or Virginia is the “home state,” depending on the trial court’s decision regarding the disputed facts. Thus, “significant connections” are irrelevant in this case.

{¶24} We further note that the trial court here improperly relied on its discussion with the Virginia judge regarding what would be in the children’s best interest. As the Ohio Supreme Court explained in *Rosen*, the UCCJEA “eliminates a determination of ‘best interests’ of a child from the original jurisdictional inquiry.” *Id.* at ¶ 21. There is also no indication that the trial court recorded its conversation with the Virginia judge, as required under R.C. 3127.09(D) and (E), such that the parties could be granted access to the recording.

{¶25} Mother’s two assignments of error are sustained.

{¶26} Judgment reversed. This case is remanded for the trial court to hold an evidentiary hearing to determine whether Ohio or Virginia is the “home state” of the children.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to

Rule 27 of the Rules of Appellate Procedure.

  
\_\_\_\_\_  
MARY J. BOYLE, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and  
MARY EILEEN KILBANE, J., CONCUR

COURT OF COMMON PLEAS, JUVENILE DIVISION  
CUYAHOGA COUNTY, OHIO

IN THE MATTER OF: E ■■■■ G ■■■■

CASE NO: PR12703234  
JUDGE: ALISON L. FLOYD

JOURNAL ENTRY

This matter came on for hearing this 13<sup>th</sup> day of March, 2014, before Judge Alison L. Floyd upon the issue of jurisdiction pursuant to R.C. 3127.01 et seq..

The Court found that notice requirements have been met and that all necessary parties were present in court.

The following persons were present for the hearing: Brian C. Nelsen, counsel for N ■■■■ G ■■■■; Robert Dubyak, counsel for S ■■■■ F ■■■■; N ■■■■ G ■■■■, Father; S ■■■■ F ■■■■, Mother.

Whereupon, the court heard evidence and testimony.

The Court finds that the mother, Ms. F ■■■■, has and continues to make her primary residence in the state of Ohio, since 2003, and specifically in Cuyahoga County, since 2004. The evidence failed to show that mother intended on relinquishing her residence to establish another home state.

The Court finds that Mr. G ■■■■, who mother has alleged in her complaint, is the natural father of the child, has and continues to maintain the state of Virginia as his home state. There was insufficient evidence to show that father intended to relinquish his residence to establish another home state.

It is undisputed that at the time of the child's birth in the state of Ohio, the parties were not married. Despite father's presence at the hospital for the birth of the child, mother asserts in her complaint that she is seeking an order of the court to establish the existence of a parent-child relationship between Mr. G ■■■■ and the child.

The Court finds that no clear and convincing evidence was presented by either party to show that or how paternity was established for the child. Pursuant to R.C. 3109.42, an unmarried female who gives birth to a child is the sole residential parent and legal custodian of the child until a court of competent jurisdiction issue an order designating another person as the residential parent and legal custodian of the child.

The Court further finds that based on the evidence presented, mother did not waive, relinquish or abandon her parental responsibilities and custody to Mr. G ■■■■ such that the court could reasonably conclude that the child has established a residence and home state outside of or apart from his legal custodian.

The Court therefore finds and concludes that the state of Ohio is the home state of the mother and the child; and that in accordance with R.C. 3127.15(A)(1), this Court finds that it has jurisdiction over the parties and to determine the issues.

It is therefore ordered that this matter shall be scheduled for pretrial and paternity establishment pending hearing on the merits of mother's complaint on June 12, 2014 at 10:30 a.m.

It is further ordered that the child should be returned to the care, custody and control of mother, S ■■■■ Fekadu, along with his sibling, not later than June 7, 2014, or earlier as may be determined by the parties.



---

Judge Alison L. Floyd  
April 21, 2014

**Filed with the clerk and journalized by Cuyahoga County Juvenile Court Clerks Office,  
Volume 90, Page 3014, April 22, 2014, cjasmw**

COURT OF COMMON PLEAS, JUVENILE DIVISION  
CUYAHOGA COUNTY, OHIO

IN THE MATTER OF: Y [REDACTED] G [REDACTED]

CASE NO: PR12703235

JUDGE: ALISON L. FLOYD

JOURNAL ENTRY

This matter came on for hearing this 13<sup>th</sup> day of March, 2014, before Judge Alison L. Floyd upon the issue of jurisdiction pursuant to R.C. 3127.01 et seq.

The Court found that notice requirements have been met and that all necessary parties were present in court.

The following persons were present for the hearing: Brian C. Nelsen, counsel for N [REDACTED] G [REDACTED]; Robert Dubyak, counsel for S [REDACTED] F [REDACTED], N [REDACTED] G [REDACTED], Alleged Father; S [REDACTED] F [REDACTED] Mother.

Whereupon, the court heard evidence and testimony.

The Court finds that the mother, Ms. F [REDACTED], has and continues to make her primary residence in the state of Ohio, since 2003, and specifically in Cuyahoga County, since 2004. The evidence failed to show that mother intended on relinquishing her residence to establish another home state.

The Court finds that Mr. G [REDACTED], who mother has alleged in her complaint, is the natural father of the child, has and continues to maintain the state of Virginia as his home state. There was insufficient evidence to show that father intended to relinquish his residence to establish another home state.

It is undisputed that at the time of the child's birth in the state of Ohio, the parties were not married. Despite father's presence at the hospital for the birth of the child, mother asserts in her complaint that she is seeking an order of the court to establish the existence of a parent-child relationship between Mr. G [REDACTED] and the child.

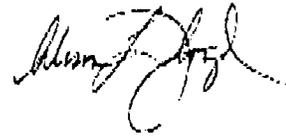
The Court finds that no clear and convincing evidence was presented by either party to show that or how paternity was established for the child. Pursuant to RC 3109.42, an unmarried female who gives birth to a child is the sole residential parent and legal custodian of the child until a court of competent jurisdiction issue an order designating another person as the residential parent and legal custodian of the child.

The Court further finds that based on the evidence presented, mother did not waive, relinquish or abandon her parental responsibilities and custody to Mr. G [REDACTED] such that the court could reasonably conclude that the child has established a residence and home state outside of or apart from her legal custodian.

The Court therefore finds and concludes that the state of Ohio is the home state of the mother and the child; and that in accordance with R.C. 3127.15(A)(1), this Court finds that it has jurisdiction over the parties and to determine the issues.

It is therefore ordered that this matter shall be scheduled for pretrial and paternity establishment pending hearing on the merits of mother's complaint on June 12, 2014 at 10:30 a.m.

It is further ordered that the child should be returned to the care, custody and control of mother, S [REDACTED] F [REDACTED], along with her sibling, not later than June 7, 2014, or earlier as may be determined by the parties.



---

Judge Alison L. Floyd  
April 21, 2014

**Filed with the clerk and journalized by Cuyahoga County Juvenile Court Clerks Office,  
Volume 90, Page 4931, April 24, 2014, DSpearman**

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

[REDACTED] NG )  
 )  
 Plaintiff/Counter-Defendant )  
 )  
 v. )  
 )  
 [REDACTED] USF )  
 )  
 Defendant/Counter-Plaintiff )  
 )

Case No. CJ12-59; 12-61; 12-62

ORDER OF DISMISSAL

ON THE 23<sup>rd</sup> DAY OF MAY, 2014, the parties through counsel came before this Court on Defendant's Motion to Dismiss this Appeal of the Order of Custody from the Juvenile and Domestic Relations Court, Dated June 5, 2012; and it

APPEARING TO THE COURT that is stayed the instant custody appeal by a Visitation Order entered on July 15, 2013, until further order to allow the Ohio trial court to hold an evidentiary hearing to determine whether Ohio or Virginia is the "home state" of the children; and it further

APPEARING TO THE COURT that the Court of Common Pleas, Juvenile Division, Cuyahoga County, Ohio, following an evidentiary hearing in which the parties and their attorneys appeared, entered two (2) Orders on April 21, 2014, finding that Ohio is the home state of the two (2) children of the parties to this custody appeal; and it further

APPEARING TO THE COURT that the Ohio trial court has schedule a pre-trial on the issues of custody, including visitation, for June 12, 2014; it is therefore

ADJUDGED, ORDERED and DECREED that the custody appeal in the instant case before this Court be, and it hereby is, dismissed and the Visitation Order entered on July 15, 2013, be and it hereby is vacated.

Entered this 23<sup>rd</sup> day of May, 2014.

William A. ...  
Judge, Arlington Country Circuit Court

SEEN AND OBJECTED to AS TO DENIAL OF PLAINTIFFS MOTION AND DISMISSAL OF APPEALS, ALSO OBJECTED to AS TO CHARACTERIZATION OF OH 4/21/2014

~~Denian J. McGarry~~  
Denian J. McGarry, VSB # 70199/  
McGarry Law Firm, PLLC  
Counsel for Plaintiff  
500 North Washington Street, Suite 201  
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Tel: 571/482-5151, Fax: 571/571-5153  
deni@mcgarrylawfirm.com

decision AS  
having decided  
home state  
of the  
children

SEEN AND AGREED TO:

Paul R. Smollar  
Paul R. Smollar, VSB #28428  
Kuder, Smollar & Friedman, P.C.  
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A COPY  
TESTED  
BY  
DEPUTY CLERK

Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Andrea Rocco, Clerk of Courts

S/O EX REL., N.G.

Relator COA NO.  
101425

ORIGINAL ACTION

-vs-

CUY.CTY.CT./COMM.PLEAS,JUV.DIV.ETAL.

Respondent MOTION NO. 478127

Date 09/30/14

Journal Entry

Writ granted.



FILED AND JOURNALIZED  
PER APP.R. 22(C)

SEP 30 2014

CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
By [Signature] Deputy

Adm. Judge, MARY J. BOYLE, Concur

Judge SEAN C. GALLAGHER, Concur

[Signature]  
KENNETH A. ROCCO  
Judge

SEP 30 2014

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
No. 101425

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**STATE OF OHIO, EX REL., N.G.**

RELATOR

vs.

**CUYAHOGA COUNTY COURT OF COMMON  
PLEAS, JUVENILE DIVISION, ET AL.**

RESPONDENT

---

**JUDGMENT:  
WRIT GRANTED**

---

Writ of Prohibition  
Motion No. 476840  
Order No. 478127

**RELEASE DATE:** September 30, 2014

APP-000041

**FOR RELATOR**

Brian C. Nelsen  
9 Corporation Center  
Broadview Heights, Ohio 44147

**ATTORNEYS FOR RESPONDENT**

Timothy J. McGinty  
Cuyahoga County Prosecutor

By: T. Allan Regas  
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FILED AND JOURNALIZED  
PER APP.R. 22(C)

SEP 30 2014

CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
By [Signature] Deputy

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KENNETH A. ROCCO, J.:

{¶1} Relator, N.G., filed this writ of prohibition seeking to prevent respondents, Judge Alison Floyd, and the Cuyahoga County Court of Common Pleas, Juvenile Division, from exercising jurisdiction with respect to S.F.'s ("mother") complaint to establish a parent-child relationship between two minor children and N.G., their alleged father. Relator maintains that respondents' continued exercise of jurisdiction is unauthorized by law and conflicts with the jurisdiction that has already been exercised by the Arlington Juvenile and Domestic Relations District Court of the Commonwealth of Virginia (the "Virginia court") over his petition for an allocation of parental rights of the same minor children wherein N.G. acknowledged paternity. For the reasons that follow, we find that respondents patently and unambiguously lack jurisdiction to proceed in the juvenile cases because there is a child-custody case that is already pending in a court of another state involving these parties, that court is exercising jurisdiction consistently with the state's version of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), and that court made the initial custody determination. Relator is entitled to the requested writ of prohibition for the reasons that follow.

{¶2} On February 27, 2012, mother filed her complaint with respondent court and the matter was assigned to the respondent judge. On March 20, 2012, relator filed a petition seeking allocation of parental rights in the Virginia court.

Relator filed a motion to dismiss the Ohio action on the grounds that Virginia was the "home state" pursuant to R.C. 3127.15. According to an order from the Virginia court dated May 8, 2012, respondent judge communicated with the Virginia court on April 30, 2014, which indicated that father had "admitted paternity of the children," that the children had lived in Arlington at least 6 of the last 12 months, and that the two courts had determined that Virginia was the home state and the more convenient forum.<sup>1</sup>

{¶3} Respondent judge issued a journal entry on May 29, 2012 and included among her findings that "the alleged father acknowledges paternity before the Virginia court" and that "Virginia is the home state of the child." The order further provided that "there was reasonable cause to believe" that the children "had resided in the State of Virginia more than six months prior to the commencement of the action", that there were "significant contacts with the State of Virginia" and "that Virginia would be a court of competent jurisdiction."

{¶4} Based on the determinations by the Ohio and Virginia courts, which had decided that Virginia was the home state and the more convenient and most expeditious forum to address the custody issue under the circumstances,

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<sup>1</sup>The parties have submitted various court orders and documents as evidentiary materials for our consideration. Since the parties raise no objection to the authenticity of these documents and we find them to be reliable, we consider them in ruling on this matter. *Accord In the matter of B.P.*, 11th Dist. Trumbull No. 2011-T-0032, 2011-Ohio-2334, ¶ 2; *see also France v. Celebrezze*, 8th Dist. Cuyahoga No. 98147, 2012-Ohio-2072, ¶ 6, citing Evid.R. 201(B).

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respondent judge dismissed mother's complaint on May 29, 2012.

{¶5} On June 5, 2012, the Virginia court issued an initial custody determination. The Virginia court order reflects, "All provisions of the Juvenile and Domestic Relations District Court Law have been duly complied with in assuming jurisdiction over the child, and all determinations have been made in accordance with the standards set forth in Virginia Code § 16.1-278.4, § 16.1-278.5, § 16.1-278.6 or § 16.2-278.8 or § 16.1-278.15 and §§ 20-124.1 through 20.124.10." The Virginia court ordered "joint legal custody of [the children] is hereby granted to the parents with primary physical custody with father. Liberal visitation with mother and half of the summer."

{¶6} Mother moved the Ohio court to reconsider its dismissal, which was denied on June 28, 2012. Mother filed an appeal to this court on July 5, 2012, *In re: E.G.*, 8th Dist. Cuyahoga No. 98652, 2013-Ohio-495. Father did not file a timely brief and this court denied his motion for an extension of time to file a brief after the case had already been scheduled for oral argument. Paternity was not an issue in the appeal and this court noted that "father had acknowledged paternity in the Virginia action." *Id.* at ¶ 5. This court found that the juvenile court, however, had erred by dismissing the complaint without holding an evidentiary hearing to resolve the dispute over where the children had resided. Specifically, the opinion provides: "If the trial court determines, after holding an evidentiary hearing, that the children did, in fact, live in Virginia from April 24,

2011 to November 1, 2011, as father claims they did, then the Cuyahoga County Juvenile Court lacks jurisdiction to determine the action because Virginia would be the children's 'home state' under the UCCJEA \* \* \* if, however, the trial court determines that the children lived in Ohio — with only 'temporary absences' from home — then Ohio is the children's 'home state' for purposes of jurisdiction under the UCCJEA." *Id.* at ¶ 21-22. The opinion was released on February 13, 2014. The Virginia court's June 5, 2012 order was not mentioned in the opinion and would not have been a part of the appellate record because mother's complaint was dismissed before the Virginia court issued the initial custody determination.

{¶7} On March 13, 2014, respondent judge held a hearing to determine jurisdiction and found Ohio is the home state based on the following rationale:

It is undisputed that at the time of the child's birth in the state of Ohio, the parties were not married. Despite father's presence at the hospital for the birth of the child, mother asserts in her complaint that she is seeking an order of the court to establish the existence of a parent-child relationship between [father] and the child.

The court finds that no clear and convincing evidence was presented by either party to show that or how paternity was established for the child. Pursuant to R.C. 3109.42 [sic, should be 3109.042], an unmarried female who gives birth to a child is the sole residential parent and legal custodian of the child until a court of competent jurisdiction issue an order designating another person as the residential parent and legal custodian of the child.

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The Court therefore finds and concludes that the state of Ohio is the home state of the mother and the child; and that in accordance with R.C. 3127.15(A)(1), this Court finds that it has jurisdiction over the parties and to determine the issues.

Respondent judge ordered the matter to be scheduled for pretrial and paternity establishment pending hearing on the merits of mother's complaint.

{¶8} N.G. filed this original action seeking to afford Virginia's initial custody determination full faith and credit by issuing a writ of prohibition preventing respondents from exercising jurisdiction in *In Re: E.G. & Y.G.*, Cuyahoga C.P. Nos. PR-12703234 and PR-12703235. Relator's complaint avers that copies of the Virginia court orders were admitted into evidence during the jurisdictional evidentiary hearing and respondents do not dispute it. There is no dispute that respondent judge's May 29, 2014 order has created a multi-state jurisdictional conflict between the Ohio and Virginia courts that are concurrently exercising jurisdiction over the same custody dispute.

{¶9} In order for this court to issue a writ of prohibition, relator is required to demonstrate each prong of the following three-part test: (1) respondent is about to exercise judicial power; (2) the exercise of judicial power by respondent is not authorized by law; and (3) there exists no other adequate remedy in the ordinary course of the law. *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005-Ohio-3804, 831 N.E.2d 1003, ¶ 14. The third element requiring proof of a lack of an adequate remedy at law is not necessary when the lack of

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judicial authority to act is patent and unambiguous. *Id.* at ¶ 16.

{¶10} The purpose of the UCCJEA is to avoid jurisdictional conflicts between the states in custody matters. *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, 883 N.E.2d 420, ¶ 21 (the UCCJEA gives “jurisdictional priority and exclusive continuing jurisdiction to the home state.”)

{¶11} R.C. 3127.33(A) provides that

“[a] court of this state shall recognize and enforce a child custody determination of a court of another state if that state exercised jurisdiction in substantial conformity with this chapter or the determination was made under factual circumstances meeting the jurisdictional standards of this chapter and the determination has not been modified in accordance with this chapter.”

{¶12} R.C. 3127.15 governs the jurisdiction of the Ohio court to make an initial custody determination 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:

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

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

(3) All courts having jurisdiction under division (A)(1) or (2) of this section have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under section 3127.21 or 3127.22 of the Revised Code or a similar statute enacted by another state.

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

(B) Division (A) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

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

"Home state" is defined as: "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately preceding the commencement of a child custody proceeding and, if a child is less than six months old, the state in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month or other period." R.C. 3127.01(B)(7). "Initial determination" means the first child custody determination concerning a particular child." R.C. 3127.01(B)(8).

{¶13} Virginia's codified UCCJEA is substantially similar to Ohio's statutory version of it. See Va.Code §§ 20-146.1 and 20-146.12.

{¶14} It is undisputed that the Virginia court made the initial custody determination. Under both Ohio and Virginia law, a court that has made the

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initial child custody determination consistent with the UCCJEA has exclusive and continuing jurisdiction as long as the child, the child's parents, or any person acting as a parent continue to live in the state. R.C. 3127.16; Va.Code 20-146.13; *Rosen v. Celebrezze*, 2008-Ohio-853, ¶ 21. Father continues to live in Virginia.

{¶ 15} Although this court in *In re E.G.* reversed the dismissal of mother's complaint and remanded for a jurisdictional hearing to resolve a factual dispute over where the children had been living, the implications of the Virginia court having exercised jurisdiction based upon the determination that Virginia was the home state were unknown and, therefore, were not addressed. On remand, relator presented evidence of the Virginia court's initial determination. Respondent judge did not address the factual dispute or attempt to determine the home state as directed by this court's mandate in *In re: E.G.*, nor is there any explanation why the Virginia court's determination of Virginia as the home state was ignored.<sup>2</sup> Respondent judge, however, issued an order declaring that Ohio was the home state pursuant to "R.C. 3109.42"<sup>3</sup> finding that mother was an unmarried mother and paternity had not been established by clear and convincing evidence.

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<sup>2</sup>Presuming regularity, the Virginia court obviously resolved the factual dispute between the parties over where the children had been living in relator's favor and there is no indication that mother ever challenged or appealed that ruling in Virginia.

<sup>3</sup>We presume respondent intended to reference R.C. 3109.042, which addresses custody rights of an unmarried mother. R.C. 3109.42 establishes that a parent who is convicted of killing the other parent is ineligible for custody of a child.

{¶16} R.C. 3109.042 provides:

An unmarried female who gives birth to a child is the sole residential parent and legal custodian of the child *until a court of competent jurisdiction issues an order designating another person as the residential parent and legal custodian*. A court designating the residential parent and legal custodian of a child described in this section shall treat the mother and father as standing upon an equality when making the designation.

(Emphasis added.)

{¶17} Respondent's May 29, 2014 order does not mention the Virginia court order that found paternity had been established or respondent's own prior order (dated May 25, 2012) that found father had acknowledged paternity in the Virginia action, or this court's opinion that also noted father had acknowledged paternity in the Virginia action. *In re E.G.*, 2013-Ohio-495, ¶ 5. Under Virginia law, a parent and child relationship can be established by scientifically reliable genetic tests, by acknowledgement, or by court order. See Va.Code 20-49.1 and 20-49.8. The Virginia court is a court of competent jurisdiction and issued an order on June 5, 2012, that designated joint legal custody to both parents with primary physical custody to relator. Accordingly, the provision of R.C. 3109.042 which would designate mother, who is unmarried, as the sole residential parent and legal custodian became inapplicable on June 5, 2012. Respondent did not offer any basis for disregarding the Virginia court's initial custody determination order.

{¶18} The Virginia court's order is entitled to full faith and credit. R.C.

3127.43; R.C. 3127.20; *see also*, *In re B.P.* 11th Dist. Trumbull No. 2011-T-0032, 2011-Ohio-2334, ¶ 64 (Oklahoma's custody order had not been vacated, stayed or modified and was, therefore, entitled to full faith and credit under Ohio law); *see also State ex rel. Morenz v. Kerr*, 104 Ohio St.3d 148, 2004-Ohio-6208, 818 N.E.2d 1162 (holding Ohio court patently and unambiguously lacks jurisdiction to proceed in a child-custody case when a child-custody case is already pending in a court of another state and that court is exercising jurisdiction consistently with the law); *see also State ex rel. Seaton v. Holmes*, 100 Ohio St.3d 265, 2003-Ohio-5897, 798 N.E.2d 375 (holding Ohio court patently and unambiguously lacked jurisdiction over post-decree child custody motions even though father had returned to live in Ohio because all of the parties had previously moved from Ohio).

{¶19} It is well settled that the drafters of the UCCJEA intended it to “be construed to promote one of its primary purposes of avoiding the jurisdictional competition” and that is the primary purpose of the act. *Rosen*, 2008-Ohio-853, ¶ 38, 41. The Virginia court that has considered relator's petition for custody is exercising jurisdiction in conformity with UCCJEA. Respondent's failure to acknowledge the Virginia court's initial custody determination order and afford it full faith and credit created the exact situation that the UCCJEA aims to avoid — a multi-state jurisdictional conflict in a child custody matter. Respondents, in their motion for summary judgment, recognize that the Virginia court's order is

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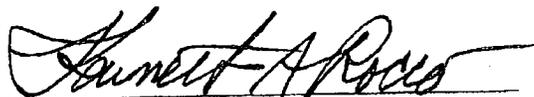
the initial determination that “complicates” the circumstances because such an order generally creates exclusive and continuing jurisdiction in the court that issued it. Respondents, however, question whether the order was issued “consistent with” the Virginia court’s jurisdiction to do so under the Virginia Code due to a reference concerning the best interests of the child in the court’s custody order. However, the Virginia court’s record of proceedings dated May 8, 2012, reflects that jurisdiction had been previously determined pursuant to the UCCJEA and after the Virginia judge had engaged in communications with respondent judge as required by Va.Code § 20-149.9. Virginia was deemed the home state based on the children having lived in Arlington at least 6 of the last 12 months. There is no indication that the Virginia court exercised jurisdiction inconsistent with its authority to do so.

{¶20} Respondents’ exercise of jurisdiction in this matter is not a mere error in the determination of its jurisdiction that can be adequately remedied by a later appeal. Respondents are patently and unambiguously without jurisdiction based on the UCCJEA. Relator is entitled to a writ of prohibition. The writ of prohibition is granted and respondents’ motion for summary judgment is denied. Respondents are prohibited from proceeding in the Ohio child-custody matters of *In re: E.G. & Y.G.*, Cuyahoga C.P. Nos. PR-12703234 and PR-12703235, and respondents are directed to vacate all orders entered on and after March 13, 2014. Respondents to pay costs. Costs waived.

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{¶21} This court directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶22} Writ granted.



KENNETH A. ROCCO, JUDGE

MARY J. BOYLE, A.J., and  
SEAN C. GALLAGHER, J., CONCUR

The State of Ohio, }  
Cuyahoga County. } ss.

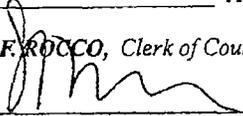
I, ANDREA F. ROCCO, Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal entry dated on 09-30-2014 CA 101425

of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry dated on 09-30-2014 CA 101425 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 30th day of September A.D. 20 14

ANDREA F. ROCCO, Clerk of Courts

By  Deputy Clerk

## Chapter 3127: UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

### **3127.01 Definitions.**

(A) As used in the Revised Code, "uniform child custody jurisdiction and enforcement act" means the act addressing interstate recognition and enforcement of child custody orders adopted in 1997 by the national conference of commissioners on uniform state laws or any law substantially similar to the act adopted by another state.

(B) As used in sections 3127.01 to 3127.53 of the Revised Code:

(1) "Abandoned" means the parents of a child have failed to visit or maintain contact with the child for more than ninety days, regardless of whether the parents resume contact with the child after that ninety-day period.

(2) "Child" means an individual who has not attained eighteen years of age.

(3) "Child custody determination" means a judgment, decree, or other order of a court that provides for legal custody, physical custody, parenting time, or visitation with respect to a child. "Child custody determination" includes an order that allocates parental rights and responsibilities. "Child custody determination" includes permanent, temporary, initial, and modification orders. "Child custody determination" does not include an order or the portion of an order relating to child support or other monetary obligations of an individual.

(4) "Child custody proceeding" means a proceeding in which legal custody, physical custody, parenting time, or visitation with respect to a child is an issue. "Child custody proceeding" may include a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, parentage, termination of parental rights, or protection from domestic violence. "Child custody proceeding" does not include a proceeding regarding juvenile delinquency, contractual emancipation, or enforcement pursuant to sections 3127.31 to 3127.47 of the Revised Code.

(5) "Commencement" means the filing of the first pleading in a proceeding.

(6) "Court" means an entity authorized under the law of a state to establish, enforce, or modify a child custody determination.

(7) "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately preceding the commencement of a child custody proceeding and, if a child is less than six months old, the state in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month or other period.

(8) "Initial determination" means the first child custody determination concerning a particular child.

(9) "Issuing court" means the court that makes a child custody determination for which enforcement is sought under sections 3127.01 to 3127.53 of the Revised Code.

(10) "Issuing state" means the state in which a child custody determination is made.

~~(11) "Modification" means a child custody determination that changes, replaces, supersedes, or is otherwise made after a determination concerning the same child, whether or not it is made by the court that made the previous determination.~~

(12) "Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(13) "Person acting as a parent" means a person, other than the child's parent, who meets both of the following criteria:

(a) The person has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence from the child, within one year immediately before the commencement of a child custody proceeding; and

(b) The person has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

(14) "Physical custody" means the physical care and supervision of a child.

(15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(16) "Tribe" means an Indian tribe or Alaskan Native village that is recognized by federal or state law.

(17) "Warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

Effective Date: 04-11-2005

### **3127.02 Application of chapter.**

Sections 3127.01 to 3127.53 of the Revised Code do not govern adoption proceedings or proceedings pertaining to the authorization of emergency medical care for a child.

Effective Date: 04-11-2005

### **3127.03 Custody proceeding pertaining to Indian child.**

(A) A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. 1901 et seq., is not subject to sections 3127.01 to 3127.53 of the Revised Code to the extent that the proceeding is governed by the Indian Child Welfare Act.

(B) A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying sections 3127.01 to 3127.53 of the Revised Code.

(C) A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of sections 3127.01 to 3127.53 of the Revised Code shall be recognized and enforced under sections 3127.31 to 3127.47 of the Revised Code.

Effective Date: 04-11-2005

### **3127.04 Foreign country treated as state - enforcement of foreign custody determinations.**

(A) A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying sections 3127.01 to 3127.24 of the Revised Code.

(B) Except as otherwise provided in division (C) of this section, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of sections 3127.01 to 3127.53 of the Revised Code shall be recognized and enforced under sections 3127.31 to 3127.47 of the Revised Code.

(C) A court of this state need not apply sections 3127.01 to 3127.53 of the Revised Code if the law governing child custody determinations of a foreign country violates fundamental principles of human rights.

Effective Date: 04-11-2005

### **3127.05 Custody determinations under chapter as binding.**

A child custody determination made by a court of this state with jurisdiction under sections 3127.01 to 3127.53 of the Revised Code binds all persons who have been served in accordance with the laws of this state, notified in accordance with section 3127.07 of the Revised Code, or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

Effective Date: 04-11-2005

### **3127.06 Calendar priorities.**

Upon the request of a party to a child custody proceeding that raises a question of existence or exercise of jurisdiction under sections 3127.01 to 3127.53 of the Revised Code, the question shall be given calendar priority and handled expeditiously.

Effective Date: 04-11-2005

### **3127.07 Notice and proof of service for personal jurisdiction outside Ohio.**

(A) Notice required for the exercise of jurisdiction over a person outside this state may be given in a manner prescribed by the Rules of Civil Procedure, or the Rules of Juvenile Procedure, as appropriate, for service of process or by the law of the state in which the service is made. Notice shall be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.

(B) Proof of service may be made in the manner prescribed by the Rules of Civil Procedure, or the Rules of Juvenile Procedure, as appropriate, or by the law of the state in which the service is made.

(C) Notice is not required if the person submits to the jurisdiction of the court.

Effective Date: 04-11-2005

### **3127.08 Immunity to personal jurisdiction regarding unrelated matter.**

(A) A party to a child custody proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a child custody determination, is not subject to personal jurisdiction in this state for another proceeding or purpose solely by reason of having participated, or of ~~having been physically present for the purpose of participating, in the child custody proceeding.~~

(B) A person who is subject to personal jurisdiction in this state on a basis other than physical presence is not immune from service of process in this state. A party present in this state who is subject to the

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jurisdiction of another state is not immune from service of process allowable under the laws of that state.

(C) The immunity granted by division (A) of this section does not extend to civil litigation based on acts unrelated to the participation in a proceeding under sections 3127.01 to 3127.53 of the Revised Code that are committed by an individual while present in this state.

Effective Date: 04-11-2005

### **3127.09 Communication with non-Ohio court - opportunity to participate.**

(A) A court of this state may communicate with a court in another state concerning a proceeding arising under sections 3127.01 to 3127.53 of the Revised Code.

(B) The court may give the parties the opportunity to participate in the communication. If the parties are not able to participate in the communication, they shall be given the opportunity to present facts and legal arguments before a decision concerning jurisdiction is made.

(C) Communication between courts concerning scheduling, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.

(D) Except as otherwise provided in division (C) of this section, a record shall be made of a communication under this section. The parties shall be informed promptly of the communication and granted access to the record.

(E) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

Effective Date: 04-11-2005

### **3127.10 Testimony of out-of state witnesses.**

(A) In addition to other procedures available to a party, a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(B) A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(C) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

Effective Date: 04-11-2005

### **3127.11 Requests to or from non-Ohio court - expenses - forwarding of copies.**

(A) A court of this state may request the appropriate court of another state to do any of the following:

(1) Hold an evidentiary hearing;

- (2) Order a person to produce or give evidence pursuant to procedures of that state;
  - (3) Order that an evaluation be made concerning the allocation of parental rights and responsibilities for the care of a child involved in a pending proceeding with respect to the designation of a parent as the residential parent and legal custodian of the child and with respect to the custody of the child in any other person;
  - (4) Forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request;
  - (5) Order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.
- (B) Upon request of a court of another state, a court of this state may hold a hearing or enter an order described in division (A) of this section.
- (C) The court may assess travel and other necessary and reasonable expenses incurred under divisions (A) and (B) of this section against the parties according to the law of this state.
- (D) Upon appropriate request by a court or law enforcement official of another state, a court of this state shall forward a certified copy of the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child custody proceeding to the court or law enforcement official of the other state.

Effective Date: 04-11-2005

### **3127.15 Jurisdictional basis for initial custody determination.**

- (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.
  - (3) All courts having jurisdiction under division (A)(1) or (2) of this section have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under section 3127.21 or 3127.22 of the Revised Code or a similar statute enacted by another state.

- (4) No court of any other state would have jurisdiction under the criteria specified in division (A)(1), (2), or

(3) of this section.

(B) Division (A) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

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

Effective Date: 04-11-2005

### **3127.16 Exclusive continuing jurisdiction over determination - termination.**

Except as otherwise provided in section 3127.18 of the Revised Code, a court of this state that has made a child custody determination consistent with section 3127.15 or 3127.17 of the Revised Code has exclusive, continuing jurisdiction over the determination until the court or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

Effective Date: 04-11-2005

### **3127.17 Modification of custody determination of non-Ohio court.**

Except as otherwise provided in section 3127.18 of the Revised Code, a court of this state may not modify a child custody determination made by a court of another state unless the court of this state has jurisdiction to make an initial determination under division (A)(1) or (2) of section 3127.15 of the Revised Code and one of the following applies:

(A) The court of the other state determines that it no longer has exclusive, continuing jurisdiction under section 3127.16 of the Revised Code or a similar statute of the other state or that a court of this state would be a more convenient forum under section 3127.21 of the Revised Code or a similar statute of the other state.

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

Effective Date: 04-11-2005

### **3127.18 Temporary emergency jurisdiction - no previous custody determination.**

(A) A court of this state has temporary emergency jurisdiction if a child is present in this state and either of the following applies:

(1) The child has been abandoned.

(2) It is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(B) If there is no previous child custody determination that is entitled to be enforced under this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state. If a child custody proceeding has not been or is not commenced in a court of a state having

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jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.

(C) If there is a previous child custody determination that is entitled to be enforced under this chapter, or a child custody proceeding has been commenced in a court of a state having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state, any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or until the period expires.

(D) A court of this state that has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in or a child custody determination has been made by a court of a state having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state, shall immediately communicate with the other court. A court of this state that is exercising jurisdiction pursuant to sections 3127.15 to 3127.17 of the Revised Code, upon being informed that a child custody proceeding has been commenced in or a child custody determination has been made by a court of another state under a statute similar to this section, shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

Effective Date: 04-11-2005

### **3127.19 Notice and opportunity to be heard.**

(A) Before a child custody determination is made under this chapter, notice and an opportunity to be heard in accordance with the standards set forth in section 3127.07 of the Revised Code shall be given to all persons entitled to notice under the law of this state as in child custody proceedings between residents of this state, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child.

(B) This chapter does not govern the enforceability of a child custody determination made without notice or an opportunity to be heard.

(C) The obligation to join a party and the right to intervene as a party in a child custody proceeding under this chapter shall be governed by the law of this state as in child custody proceedings between residents of this state.

Effective Date: 04-11-2005

### **3127.20 Custody proceeding pending in another state.**

(A) Except as otherwise provided in section 3127.18 of the Revised Code, a court of this state may not exercise its jurisdiction under sections 3127.15 to 3127.17 of the Revised Code if, at the time of the commencement of the proceeding, a child custody proceeding concerning the child is pending in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under section 3127.21 of the Revised Code or a similar statute of the other state.

(B) Except as otherwise provided in section 3127.18 of the Revised Code, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to section 3127.23 of the Revised Code. If the court determines that a child custody proceeding is pending in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(C) In a proceeding to modify a child custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may do any of the following:

- (1) Stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;
- (2) Enjoin the parties from continuing with the proceeding for enforcement;
- (3) Upon the demonstration of an emergency, proceed with the modification under conditions the court considers appropriate.

Effective Date: 04-11-2005

### **3127.21 Jurisdiction declined - forum non conveniens.**

(A) A court of this state that has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more convenient forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or at the request of another court.

(B) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including the following:

- (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (2) The length of time the child has resided outside this state;
- (3) The distance between the court in this state and the court in the state that would assume jurisdiction;
- (4) The relative financial circumstances of the parties;
- (5) Any agreement of the parties as to which state should assume jurisdiction;
- (6) The nature and location of the evidence required to resolve the pending litigation, including the testimony of the child;
- (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence;
- (8) The familiarity of the court of each state with the facts and issues in the pending litigation.

(C) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(D) A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

Effective Date: 04-11-2005

### **3127.22 Jurisdiction declined - unjustifiable conduct - remedy - assessment of expenses.**

(A) Except as otherwise provided in section 3127.18 of the Revised Code or another law of this state, if a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless one of the following applies:

- (1) The parents and all persons acting as parents have agreed to the exercise of jurisdiction.
- (2) A court of the state otherwise having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code determines that this state is a more appropriate forum under section 3127.21 of the Revised Code or a similar statute of the state.
- (3) No court of any other state would have jurisdiction under the criteria specified in sections 3127.15 to 3127.17 of the Revised Code.

(B) If a court of this state declines to exercise its jurisdiction pursuant to division (A) of this section, it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under sections 3127.15 to 3127.17 of the Revised Code or a similar statute of another state.

(C) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to division (A) of this section, it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state or a political subdivision of this state unless authorized by law other than this chapter.

(D) As used in this section, "unjustifiable conduct" means conduct by a parent or that parent's surrogate that attempts to create jurisdiction in this state by removing the child from the child's home state, secreting the child, retaining the child, or restraining or otherwise preventing the child from returning to the child's home state in order to prevent the other parent from commencing a child custody proceeding in the child's home state.

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### **3127.23 Contents of pleading or affidavit.**

(A) Each party in a child custody proceeding, in the party's first pleading or in an affidavit attached to that pleading, shall give information if reasonably ascertainable under oath as to the child's present address or whereabouts, the places where the child has lived within the last five years, and the name and present address of each person with whom the child has lived during that period. In this pleading or affidavit, each party also shall include all of the following information:

(1) Whether the party has participated as a party, a witness, or in any other capacity in any other proceeding concerning the allocation, between the parents of the same child, of parental rights and responsibilities for the care of the child including any designation of parenting time rights and the designation of the residential parent and legal custodian of the child or that otherwise concerned the custody of or visitation with the same child and, if so, the court, case number and the date of the child custody determination, if any;

(2) Whether the party knows of any proceedings that could affect the current proceeding, including proceedings for enforcement of child custody determinations, proceedings relating to domestic violence or protection orders, proceedings to adjudicate the child as an abused, neglected, or dependent child, proceedings seeking termination of parental rights, and adoptions, and, if so, the court, the case number, and the nature of the proceeding;

(3) Whether the party knows of any person who is not a party to the proceeding and has physical custody of the child or claims to be a parent of the child who is designated the residential parent and legal custodian of the child or to have parenting time rights with respect to the child or to be a person other than a parent of the child who has custody or visitation rights with respect to the child and, if so, the names and addresses of those persons.

(B) If the declaration under division (A)(1), (2), or (3) of this section is in the affirmative, the declarant shall give additional information as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case.

(C) Each party has a continuing duty to inform the court of any child custody proceeding concerning the child in this or any other state that could affect the current proceeding.

(D) If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by the disclosure of identifying information, the information shall be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, and liberty of the party or child and determines that the disclosure is in the interests of justice.

(E) A public children services agency, acting pursuant to a complaint or an action on a complaint filed under section 2151.27 of the Revised Code, is not subject to the requirements of this section.

(F) As used in this section, "abused child" has the same meaning as in section 2151.031 of the Revised Code, "neglected child" has the same meaning as in section 2151.03 of the Revised Code, and "dependent child" has the same meaning as in section 2151.04 of the Revised Code.

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### **3127.24 Order to appear - costs.**

(A) The court may order any party to a child custody proceeding who is in this state to appear personally

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before the court with or without the child. The court may order any person who is in this state and who has physical custody or control of the child to appear personally with the child.

(B) If a party to a child custody proceeding whose presence is desired by the court is outside this state with or without the child, the court may order that the notice given under section 3127.07 of the Revised Code include a statement directing that party to appear personally with or without the child and informing the party that failure to appear may result in a decision adverse to that party.

(C) The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this section.

(D) If a party to a child custody proceeding who is outside this state is directed to appear under division (B) of this section or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses for the appearance of the party and the child .

Effective Date: 04-11-2005

### **3127.31 Definitions - petitioner and respondent.**

As used in sections 3127.31 to 3127.47 of the Revised Code:

(A) "Petitioner" means a person who seeks enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child custody determination.

(B) "Respondent" means a person against whom a proceeding has been commenced for enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child custody determination.

Effective Date: 04-11-2005

### **3127.32 Enforcement of order for return of child under Hague convention.**

Under this chapter, and subject to sections 2101.022 and 2301.03 of the Revised Code, a juvenile court or other court with appropriate jurisdiction may enforce an order for the return of a child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child custody determination.

Effective Date: 04-11-2005

### **3127.33 Recognition of custody determination of non-Ohio court.**

(A) A court of this state shall recognize and enforce a child custody determination of a court of another state if that state exercised jurisdiction in substantial conformity with this chapter or the determination was made under factual circumstances meeting the jurisdictional standards of this chapter and the determination has not been modified in accordance with this chapter.

(B) A court of this state may use any remedy available under other law of this state to enforce a child custody determination made by a court of another state. ~~The remedies provided in sections 3127.31 to 3127.47 of the Revised Code are cumulative and do not affect the availability of other remedies to enforce a child custody determination.~~

Effective Date: 04-11-2005

**3127.34 Temporary enforcement order by court lacking jurisdiction to modify custody.**

(A) A court of this state that does not have jurisdiction to modify a child custody determination may issue a temporary order enforcing either of the following:

- (1) A parenting time or visitation schedule made by a court of another state;
- (2) The parenting time or visitation provisions of a child custody determination of another state that does not provide for a specific parenting time or visitation schedule.

(B) If a court of this state makes an order under division (A)(2) of this section, it shall specify in the order a period that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction under the criteria specified in sections 3127.15 to 3127.24 of the Revised Code. The order shall remain in effect until an order is obtained from the other court or until the period expires.

Effective Date: 04-11-2005

**3127.35 Registration of child custody determination by non-Ohio court - contest of validity.**

(A) Subject to sections 2101.022 and 2301.03 of the Revised Code, the clerk of a juvenile court or other court with appropriate jurisdiction may register a child custody determination issued by a court of another state, with or without a simultaneous request for enforcement, on receipt of all of the following:

- (1) A letter or other document requesting that the child custody determination be registered;
- (2) Two copies, including one certified copy, of the determination sought to be registered, and a statement under penalty of perjury that, to the best of the knowledge and belief of the person seeking registration, the order has not been modified;
- (3) Except as otherwise provided in section 3127.23 of the Revised Code, the name and address of the person seeking registration and any parent who is designated the residential parent and legal custodian of the child or to have parenting time with respect to the child or any person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered;
- (4) An advance deposit or fee established by the court.

(B) On receipt of the documents and information required by division (A) of this section, the registering court shall do both of the following:

- (1) Cause the child custody determination to be filed as a foreign judgment together with one copy of any accompanying documents and information, regardless of their form;
- (2) Serve notice of the registration request on the persons named pursuant to division (A)(3) of this section, and provide them with an opportunity to contest the registration in accordance with this section.

(C) The notice required by division (B)(2) of this section shall state all of the following:

- (1) That the registered child custody determination is enforceable as of the date of the registration in the same manner as a child custody determination issued by a court of this state;

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(2) That a hearing to contest the validity of the registered determination must be requested within thirty days after service of notice;

(3) That failure to contest the registration shall result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

(D) A person seeking to contest the validity of a registered order shall request a hearing within thirty days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes one of the following circumstances:

(1) The issuing court did not have jurisdiction under sections 3127.15 to 3127.24 of the Revised Code or a similar statute of another state.

(2) The child custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under sections 3127.15 to 3127.24 of the Revised Code or a similar statute of another state.

(3) The person contesting registration was entitled to notice of the child custody proceeding for which registration is sought, but notice was not given in accordance with the standards of section 3127.07 of the Revised Code or a similar statute of another state.

(E) If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law and the person requesting registration and all persons served in accordance with division (B)(2) of this section must be notified of the confirmation.

(F) Confirmation of a registered child custody determination, whether by operation of law or after notice and hearing, precludes further contest of the determination with respect to any matter that could have been asserted at the time of registration.

Effective Date: 04-11-2005

### **3127.36 Enforcement of registered custody determination by non-Ohio court.**

(A) Subject to sections 2101.022 and 2301.03 of the Revised Code, a juvenile court or other court of this state may grant any relief normally available under the law of this state to enforce a registered child custody determination made by a court of another state.

(B) Subject to sections 2101.022 and 2301.03 of the Revised Code, a juvenile court and each other court of this state shall recognize and enforce, but may not modify except in accordance with sections 3127.15 to 3127.24 of the Revised Code, a registered child custody determination of a court of another state.

Effective Date: 04-11-2005

### **3127.37 Communication with non-Ohio court where modification proceeding pending.**

Subject to sections 2101.022 and 2301.03 of the Revised Code, if a proceeding for enforcement under sections 3127.31 to 3127.46 of the Revised Code is commenced in a juvenile court or other court of this state with appropriate jurisdiction and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under sections 3127.15 to 3127.24 of the Revised Code or a similar statute of another state, the enforcing court shall

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immediately communicate with the modifying court. The proceeding for enforcement shall continue unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

Effective Date: 04-11-2005

**3127.38 Petition for enforcement of custody determination - procedure - order.**

(A) A petition for enforcement pursuant to sections 3127.31 to 3127.46 of the Revised Code must be verified. All orders sought to be enforced and any order confirming registration must be attached to the petition. The orders attached to the petition shall be the original or a certified copy, whichever a court requires.

(B) A petition for enforcement of a child custody determination shall state all of the following:

(1) Whether the court that issued the child custody determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was;

(2) Whether the determination for which enforcement is sought has been vacated, stayed, or modified by a court whose decision must be enforced under this chapter and, if so, identify the court, the case number, and the nature of the proceeding;

(3) Whether any proceeding has been commenced that could affect the current proceeding, including proceedings for enforcement of child custody determinations, proceedings relating to domestic violence or protection orders, proceedings to adjudicate the child as an abused, neglected, or dependent child, proceedings seeking termination of parental rights, and adoptions, and, if so, the court, the case number, and the nature of the proceeding;

(4) The present physical address of the child and the respondent, if known;

(5) Whether relief in addition to the immediate physical custody of the child and attorney's fees is sought, including a request for assistance from law enforcement officials and, if so, the relief sought;

(6) If the child custody determination has been registered and confirmed under section 3127.35 of the Revised Code, the date and place of registration.

(C) Upon the filing of a petition, the court shall issue an order directing the respondent to appear in person with or without the child at a hearing and may enter any order necessary to ensure the safety of the parties and the child. If possible, the hearing must be held on the next judicial day after service of the order. If holding the hearing on that date is impossible, the court shall hold the hearing on the first judicial day possible. The court may extend the date of the hearing at the request of the petitioner.

(D) An order issued under division (C) of this section shall state the time and place of the hearing and advise the respondent that at the hearing the court will order that the petitioner may take immediate physical custody of the child and that the respondent pay fees, costs, and expenses under section 3127.42 of the Revised Code and may schedule a hearing to determine whether further relief is appropriate, unless the respondent appears and establishes either of the following:

(1) That the child custody determination has not been registered and confirmed under section 3127.35 of the Revised Code and that one of the following circumstances applies:

(a) The issuing court did not have jurisdiction under sections 3127.15 to 3127.24 of the Revised Code or a similar statute of another state.

(b) The child custody determination for which enforcement is sought has been vacated, stayed, or modified by a court having jurisdiction to do so under sections 3127.15 to 3127.24 of the Revised Code or a similar statute of another state.

(c) The respondent was entitled to notice of the child custody proceeding for which enforcement is sought, but notice was not given in accordance with the standards of section 3127.07 of the Revised Code or a similar statute of another state.

(2) That the child custody determination for which enforcement is sought was registered and confirmed under section 3127.35 of the Revised Code but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under sections 3127.15 to 3127.24 of the Revised Code or a similar statute of another state.

Effective Date: 04-11-2005

### **3127.39 Service of petition and order.**

Except as otherwise provided in section 3127.41 of the Revised Code, the petition and order shall be served by any method authorized by the Rules of Civil Procedure upon respondent and any person who has physical custody of the child.

Effective Date: 04-11-2005

### **3127.40 Order to take immediate physical possession of child - additional relief - privileges.**

(A) Unless the court issues a temporary emergency order pursuant to section 3127.18 of the Revised Code, upon a finding that a petitioner is entitled to immediate physical custody of the child, the court shall order that the petitioner may take immediate physical custody of the child unless the respondent establishes either of the following:

(1) That the child custody determination has not been registered and confirmed under section 3127.35 of the Revised Code and that one of the following circumstances applies:

(a) The issuing court did not have jurisdiction under sections 3127.15 to 3127.24 of the Revised Code or a similar statute of another state.

(b) The child custody determination for which enforcement is sought has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under sections 3127.15 to 3127.24 of the Revised Code or a similar statute of another state.

(c) The respondent was entitled to notice of the child custody proceeding for which enforcement is sought, but notice was not given in accordance with the standards of section 3127.07 of the Revised Code or a similar statute of another state.

(2) That the child custody determination for which enforcement is sought was registered and confirmed under section 3127.35 of the Revised Code but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under sections 3127.15 to 3127.24 of the Revised Code or a similar statute of another state.

(B) The court shall award the fees, costs, and expenses authorized under section 3127.42 of the Revised Code, and may grant additional relief, including a request for the assistance of law enforcement officials,

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and shall set a further hearing to determine whether the additional relief is appropriate.

(C) If a party called to testify in a proceeding to enforce a child custody determination refuses to answer on the basis that the testimony may be self-incriminating, the court may draw an adverse inference from the refusal.

(D) A privilege against disclosure of communications between spouses and a defense of immunity based on the relationship of husband and wife or parent and child may not be invoked in a proceeding under this chapter.

Effective Date: 04-11-2005

### **3127.41 Warrant to take physical custody where imminent danger of harm or removal.**

(A) Upon the filing of a petition seeking enforcement of a child custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is imminently likely to suffer serious physical harm or be removed from this state.

(B) If the court, upon the testimony of the petitioner or another witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this state, it may issue a warrant to take physical custody of the child. If possible, the court shall hear the petition on the next judicial day after the warrant is executed. If it is impossible to hold a hearing on that date, the court shall hold the hearing on the first judicial day possible. The application for the warrant shall include the statements required by division (B) of section 3127.38 of the Revised Code.

(C) A warrant to take physical custody of a child shall do all of the following:

(1) Specify the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;

(2) Direct law enforcement officers to take physical custody of the child immediately;

(3) Provide for the placement of the child pending final relief.

(D) The respondent shall be served with the petition, warrant, and order immediately after the child is taken into physical custody.

(E) A warrant to take physical custody of a child is enforceable throughout this state. If the court finds on the basis of the testimony of the petitioner or another witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour.

(F) The court may impose conditions upon the placement of a child to ensure the appearance of the child and the child's custodian.

Effective Date: 04-11-2005

### **3127.42 Award of fees, expenses and costs to prevailing party.**

(A) A court shall award the prevailing party in an action to enforce a child custody determination, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, APP-000071

communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

(B) The court shall not assess fees, costs, or expenses against a state or a political subdivision of a state unless authorized by law other than this chapter.

Effective Date: 04-11-2005

### **3127.43 Full faith and credit to orders issued by court of another state.**

A court of this state shall accord full faith and credit to an order issued by another state consistent with this chapter that enforces a child custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under sections 3127.15 to 3127.24 of the Revised Code or a similar statute of another state.

Effective Date: 04-11-2005

### **3127.44 Appeal from final order.**

An appeal may be taken from a final order in a proceeding under sections 3127.31 to 3127.47 of the Revised Code. The supreme court of this state shall, by rule, provide for expedited appellate review of cases appealed under this section. Unless the court enters a temporary emergency order under section 3127.18 of the Revised Code, the enforcing court may not stay an order enforcing a child custody determination pending appeal.

Effective Date: 04-11-2005

### **3127.45 Actions to locate, obtain return of child, or enforce custody determination.**

(A) In a case arising under this chapter or involving the Hague Convention on the Civil Aspects in International Child Abduction, the prosecutor may take any lawful action, including resort to a proceeding under sections 3127.31 to 3127.47 of the Revised Code or any other available civil proceeding, to locate a child, obtain the return of a child, or enforce a child custody determination if there is any of the following:

- (1) An existing child custody determination;
- (2) A request to locate a child, obtain the return of a child, or enforce a child custody determination from a court in a pending child custody proceeding;
- (3) A reasonable belief that a criminal statute has been violated;
- (4) A reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction.

(B) A prosecutor acting under this section acts on behalf of the court and may not represent any party.

Effective Date: 04-11-2005

### **3127.46 Authorized enforcement actions by law enforcement officer.**

At the request of a prosecutor or other appropriate public official acting under section 3127.45 of the Revised Code, a law enforcement officer may take any lawful action reasonably necessary to locate a child

or a party and assist the prosecutor or appropriate public official with responsibilities under section 3127.45 of the Revised Code.

Effective Date: 04-11-2005

**3127.47 Assessment of enforcement expenses and costs against losing party.**

If the respondent is not the prevailing party, the court may assess against the respondent all direct expenses and costs incurred by the prosecutor or other appropriate public official and law enforcement officers under section 3127.45 or 3127.46 of the Revised Code.

Effective Date: 04-11-2005

**3127.51 Construction of chapter to promote uniformity.**

In applying and construing sections 3127.01 to 3127.53 of the Revised Code, consideration shall be given to the need to promote uniformity of law with respect to its subject matter among states that enact a uniform child custody jurisdiction and enforcement act.

Effective Date: 04-11-2005

**3127.52 Provisions of chapter severable.**

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter that can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

Effective Date: 04-11-2005

**3127.53 Prospective application of chapter.**

A motion or other request for relief made in a parenting or child custody proceeding or to enforce a parenting or child custody determination that was commenced before the effective date of this section is governed by the law in effect at the time the motion or other request was made.

Effective Date: 04-11-2005