[Cite as *In re B.P.*, 2011-Ohio-2334.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

IN THE MATTER OF B.P.	**:**	**O P I N I O N**
	:	**CASE NO. 2011-T-0032**

Original Action for Writ of Habeas Corpus.

Judgment: Petition granted.

Thomas E. Schubert, 138 East Market Street, Warren, OH 44481 (For Petitioner Donna Placer).

Michael Georgiadis, 135 Pine Avenue, S.E., Suite 211, Warren, OH 44481 (For Respondent Gary L. Placer, Jr.).

CYNTHIA WESTCOTT RICE, J.,

{¶1} This matter is before the court pursuant to the petition for writ of habeas corpus filed by petitioner, Donna Placer, against respondent, Gary L. Placer, Sr., whose true name is Gary L. Placer, Jr. This court granted an alternative writ, ordering Gary to respond to the petition. Gary filed a motion to dismiss and Donna filed a brief in opposition. For the reasons that follow, we deny Gary's motion and grant the writ of habeas corpus.

{¶2} Upon review of the parties' filings, we note that they have attached thereto copies of their affidavits, various pleadings, magistrate's decisions, and judgments filed in the underlying proceedings in the Trumbull County Court of Common Pleas,

Domestic Relations Division ("the domestic relations court"); the Juvenile Department of that court ("the juvenile court"); and the District Court of Cleveland County, Oklahoma ("the Oklahoma court") in support of their respective positions. 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. Except as otherwise noted, the ensuing factual history is a synopsis of the undisputed facts gleaned from the parties' evidentiary materials.

{¶3} Donna and Gary began their relationship in 2005 in Warren, Ohio, as a result of which they had a son, B.P., who was born on December 12, 2005. Although they were not married at the time, the parties and B.P. resided together in Warren.

{¶4} Donna and Gary purchased a home in Warren in October 2007 and resided there with B.P. for five months until March 2008. In April 2008, the parties were married. In that month they leased their house to Gary's family and moved to Oklahoma, where Donna's family resides. They eventually purchased a home in Oklahoma and established their residence there. While in that state, both parties were employed and attended school. After living in Oklahoma for two years, they began to experience financial difficulties. In May 2010, they lost their home in a foreclosure. In that month, they placed their belongings and furnishings in storage in Oklahoma and, according to Donna, temporarily moved back to Ohio. Their intent was to stay in Ohio that summer only in order to earn enough money to return to Oklahoma and resume their life in that state.

{¶5} Upon their return to Ohio in May 2010, the parties' marriage began to deteriorate. Donna alleged that Gary often fought with her and became violent. Donna

further alleged that she feared for her and her son's safety and, as a result, she sought shelter at Someplace Safe in Warren.

{¶6} On September 8, 2010, Donna filed a petition for domestic violence civil protection order in the domestic relations court on behalf of her and B.P. against Gary. She alleged that Gary had repeatedly subjected her to violent outbursts and verbal abuse and had threatened to kill her and to take B.P. from her. She also requested that the civil protection order temporarily grant her custody of B.P. The court entered a temporary civil protection order in favor of Donna only.

{¶7} Shortly thereafter, on September 11, 2010, Donna and B.P. returned to Oklahoma. Donna had no means of support and, as a resident of Oklahoma, she obtained public assistance in Oklahoma for her and B.P.

{¶8} One week later, on September 16, 2010, Gary filed a complaint for custody and ex parte custody in the juvenile court. In his complaint, Gary alleged that Donna suffers from bi-polar disorder and, in his opinion, she presents a danger to B.P. He alleged that the parties had left their belongings in a storage facility in Oklahoma; that Donna and B.P. had returned to Oklahoma; and that Donna had removed their property from storage. Gary requested ex parte custody due to an alleged "emergency" and permanent custody.

{¶9} On September 21, 2010, the juvenile court entered an ex parte order granting temporary emergency custody to Gary on his complaint. In its order the court found that B.P. is dependent. The order provided that it would remain in effect until December 31, 2010. Donna was served with Gary's custody complaint and the ex parte order in Oklahoma one week later on September 27, 2010.

{¶10} Also, on September 21, 2010, Donna's petition for domestic violence civil protection order came on for hearing in the domestic relations court. Because Donna remained in Oklahoma and did not attend the hearing, the domestic relations court dismissed her petition.

{¶11} On September 22, 2010, Donna filed a petition for divorce in the Oklahoma court in which she asked that she be awarded custody of B.P. In support of her request for custody, Donna alleged that Oklahoma was B.P.'s "home state," pursuant to the Uniform Child Custody and Jurisdiction Enforcement Act.

{¶12} On September 28, 2010, Donna filed an application for temporary custody of B.P. in the Oklahoma court. Gary was personally served with Donna's divorce petition and application for temporary custody on December 21, 2010. The court scheduled a hearing on Donna's petition for temporary custody. Although Gary was served with notice of that hearing, he failed to attend. On January 26, 2011, following an evidentiary hearing, the Oklahoma court found it had jurisdiction over the parties; awarded Donna temporary, sole custody of B.P. during the pendency of the divorce action; and ordered Gary to pay child support for B.P.

{¶13} Meanwhile, after Gary obtained his September 21, 2010 ex parte order, he filed a criminal complaint against Donna in the Warren Municipal Court charging her with interference with custody, and obtained a warrant for her arrest.

{¶14} Gary allegedly knew Donna attends a family reunion each October in South Carolina. Consequently, in October 2010, Gary went to the reunion and caused the local sheriff to arrest her on the warrant. Donna was confined in jail for one week. During that time Gary took possession of B.P. and returned to Warren with him.

{¶15} Donna voluntarily returned to Warren to attend a preliminary hearing in the Warren Municipal Court on December 16, 2010, on Gary's criminal complaint. After the facts were presented, the prosecutor dismissed the charge against her.

{¶16} On December 17, 2010, a hearing was scheduled on Gary's custody complaint in the juvenile court. Donna appeared through counsel, who argued that the court lacked jurisdiction to proceed. The court gave Donna leave to file a motion concerning jurisdiction.

{¶17} Meanwhile, on December 20, 2010, the Oklahoma court issued a civil protection order in favor of Donna and B.P. and against Gary. By its terms, the order was to remain in effect for three years. The order prohibited Gary from interfering with or having any contact with Donna or B.P.

{¶18} On December 29, 2010, Donna filed a motion in the juvenile court to dismiss Gary's custody complaint for lack of jurisdiction. She argued the juvenile court did not have temporary emergency jurisdiction to enter its ex parte order in favor of Gary because, on the date Gary filed his complaint, B.P. was not present in Ohio, as required by R.C. 3127.18(A).

{¶19} In his response brief, Gary argued that, because Donna filed her request for a civil protection order with a custody request in the domestic relations court before he filed his complaint in juvenile court, Donna consented to that court's jurisdiction over his complaint. Gary stated in his brief: "The [juvenile] Court acted on an ex parte or *emergency* motion/complaint and did so for the protection of the child." (Emphasis added.) Further, Gary did not dispute that B.P. was not present in Ohio on the date he filed his custody complaint. Instead, he argued B.P.'s physical presence in Ohio at that time was irrelevant due to B.P.'s previous presence in this state. Finally, he argued that

"after the initial determination by the [juvenile] Court under O.R.C. Section 3127.18, Ohio continues to have exclusive and continuing jurisdiction under O.R.C. Section 3127.16."

{¶20} On February 3, 2011, the magistrate denied Donna's motion to dismiss for lack of jurisdiction, finding: "*Under ORC Section 3127.18 this Court had jurisdiction at the time Natural Father filed his request* and has continuing jurisdiction under ORC 3127.16." (Emphasis added.) On February 7, 2011, the court adopted the magistrate's decision without giving Donna the requisite 14 days to file objections to the magistrate's decision.

{¶21} On February 10, 2011, Donna timely filed objections to the magistrate's February 3, 2011 decision.

{¶22} On February 24, 2011, the court entered an "interim" order giving Donna 30 days in which to file a transcript of the magistrate's February 3, 2011 hearing to support her objections to his decision, if she chose to do so. In its order, the court found that, as a result of the parties' physical presence in Ohio from May to September 2010 and their court filings in September 2010, Oklahoma "lost" jurisdiction and Ohio acquired it. Gary's action remains pending in the juvenile court.

{¶23} In her petition for writ of habeas corpus, Donna repeats the argument she asserted in the juvenile court. She alleges that the juvenile court lacked jurisdiction to enter its ex parte custody order pursuant to R.C. 3127.18(A) because B.P. was not "present in this state," as required by that statute. As a result, she maintains the order is void. Further, she alleges that she has a superior right to custody of the child pursuant to the custody order entered by the Oklahoma court. Donna also argues that, even if the juvenile court had temporary, emergency jurisdiction, such jurisdiction would

have terminated on September 22, 2010, the date she filed her petition for divorce and custody in Oklahoma, pursuant to R.C. 3127.18(B). She therefore requests that a writ of habeas corpus issue to the Trumbull County Sheriff to deliver B.P. to her.

{¶24} Gary now moves to dismiss Donna's petition for habeas corpus relief, arguing that this court lacks jurisdiction to entertain her petition. Gary presents only one argument. He contends that the juvenile court and this court have concurrent original jurisdiction in habeas corpus concerning child custody. He argues that, because the juvenile court first acquired jurisdiction of the custody issue by virtue of his custody complaint, this court is divested of jurisdiction to address Donna's petition. We do not agree.

{¶25} Gary's reliance on *In re Ruth* (1961), 88 Ohio L.Abs. 1 is misplaced. In that case, the father applied for a writ of habeas corpus in the common pleas court seeking an award of custody of his children. The common pleas court held that, because a neglect complaint had previously been filed in the juvenile court, that court had acquired exclusive jurisdiction over the custody issue. *Ruth* is inapposite because, in that case, the habeas corpus petition at issue was simply used as a vehicle to obtain custody; it was not used to challenge the jurisdiction of the juvenile court.

{¶26} Moreover, Ohio courts, including this court, have repeatedly held that a court of appeals has jurisdiction to entertain a petition for writ of habeas corpus challenging the jurisdiction of the trial court to rule on a request for child custody. *Timko-Gilson v. Timko* (Oct. 25, 1991), 11th Dist. No. 91-T-4597, 1991 Ohio App. LEXIS 5163, *5-*6; *Ross v. Saros*, 99 Ohio St.3d 412, 2003-Ohio-4128; *In re Frinzl* (1949), 152 Ohio St. 164, paragraph four of the syllabus.

{¶27} Thus, contrary to Gary's argument, the fact that child custody proceedings are pending in the juvenile court does not deprive this court of jurisdiction to consider Donna's petition for writ of habeas corpus challenging the juvenile court's jurisdiction. It should be obvious that the request for such a writ challenging the jurisdiction of the trial court implies that the proceedings in the lower court would have already been filed. If we were to accept Gary's argument, the lower court's jurisdiction could never be challenged on habeas corpus, defeating the purpose of the writ.

{¶28} As a preliminary matter, Gary suggests that the juvenile court has entered a final order in his custody action and that Donna should have appealed it. However, the court's February 7, 2011 order adopting the magistrate's February 3, 2011 decision is not a final order because Donna timely filed objections to the magistrate's decision and the juvenile court has not yet ruled on them. Civ.R. 53(D)(4)(e)(i); *Weygandt v. Porterfield*, 9th Dist. No. 09CA0009, 2011-Ohio-510, at ¶12. Further, the court's February 24, 2011 "interim order" "is, by definition, not a final appealable order." *LeFever v. Cornnuts, Inc*. (Jan. 22, 1999), 2d Dist. No. 98-CA-23, 1999 Ohio App. LEXIS 118, *4. In any event, whether the juvenile court has entered a final appealable order is irrelevant to our jurisdiction of Donna's petition. "Since this case is an original action, the section of the revised code which defines appealable orders (R.C. 2505.02) is inapplicable and has no bearing on its determination." *Timko*, supra, at *4.

{¶29} We now consider whether, in the circumstances of this case, we have jurisdiction to determine Donna's petition for writ of habeas corpus. Since Gary challenges the jurisdiction of this court to determine Donna's habeas corpus petition, rather than our jurisdiction over an individual, Gary's challenge is to this court's subject matter jurisdiction.

{¶30} Subject matter jurisdiction is the power conferred upon a court, either by constitutional provisions or by statute, to decide a particular matter or issue on its merits. *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 75, 1998-Ohio-275. A motion to dismiss for lack of subject matter jurisdiction is made pursuant to Civ.R. 12(B)(1), and "[t]he standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80.

{¶31} Because subject matter jurisdiction defines the competency of a court to render a valid judgment, it cannot be waived. *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 1996-Ohio-224. Personal jurisdiction, on the other hand, is the power of a court to enter a valid judgment against an individual, *Meadows v. Meadows* (1992), 73 Ohio App.3d 316, 319, and can be waived. *Timko*, supra, at *6-*7.

{¶32} Pursuant to Article IV, Section 3 of the Ohio Constitution, this court has original jurisdiction in habeas corpus. Further, R.C. 2725.02 provides: "The writ of habeas corpus may be granted by the *** court of appeals ***."

{¶33} "In order to prevail on a petition for a writ of habeas corpus in a child custody case, the petitioner must establish that (1) the child is being unlawfully detained, and (2) the petitioner has the superior legal right to custody of the child." *State ex rel. Bruggeman v. Ct. of Common Pleas of Auglaize Cty.*, 87 Ohio St.3d 257, 1999-Ohio-52.

{¶34} Further, while the lack of an adequate remedy at law is generally a necessary element for the issuance of an extraordinary writ, the absence of an adequate legal remedy is not necessary when the lack of judicial authority to act is patent and unambiguous. *McGhan v. Vettel*, 11th Dist. No. 2008-A-0036, 2008-Ohio-

6063, at ¶49-50. An appeal does not constitute an adequate remedy and does not bar extraordinary relief if the trial court "patently and unambiguously lacks jurisdiction over the pending case." *State ex rel. Lewis v. Moser*, 72 Ohio St.3d 25, 28, 1995-Ohio-148. This rule has been held to apply to habeas corpus cases. *Ross*, supra, at 414.

{¶35} In explaining the concept of a "patent and unambiguous" lack of jurisdiction, this court has held that "if there is no set of facts under which a trial court *** could have jurisdiction over a particular case, the alleged jurisdictional defect will always be considered patent and unambiguous. On the other hand, if the court *** generally has subject matter jurisdiction over the type of case in question and [its] authority to hear that specific action will depend on the specific facts before [it], the jurisdictional defect is not obvious and the [trial court] should be allowed to decide the jurisdictional issue." *State ex rel. The Leatherworks Partnership v. Stuard*, 11th Dist. No. 2002-T-0017, 2002-Ohio-6477, at ¶19.

{¶36} Therefore, if the jurisdictional decision involves the resolution of a factual dispute and the petitioner merely seeks to contest the court's ruling on the dispute, the point cannot be litigated in the context of an extraordinary writ because the alleged lack of jurisdiction is not viewed as patent and unambiguous. *Willoughby-Eastlake City School Dist. v. Lake Cty. Ct. of Common Pleas* (Apr. 21, 2000), 11th Dist. No. 99-L-130, 2000 Ohio App. LEXIS 1758, *11. *The key to the analysis is whether the court's findings of fact support its decision to exercise jurisdiction. If its findings do not support the conclusion that jurisdiction exists, the writ proceedings can go forward because the lack of jurisdiction is patent and unambiguous.* However, if the findings are consistent with the exercise of jurisdiction, the petitioner's proper remedy is an appeal of the jurisdictional determination. *The Leatherwork Partnership*, supra, at ¶20.

{¶37} R.C. 2151.23(F)(1) authorizes a juvenile court to exercise jurisdiction in custody matters in accordance with R.C. 3127.01 to R.C. 3127.53 of the Uniform Child Custody Jurisdiction and Enforcement Act ("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, quoting *In re Palmer* (1984), 12 Ohio St.3d 194, 196. The UCCJEA gives "'jurisdictional priority and exclusive continuing jurisdiction to the home state.'" (Citation omitted.) *Rosen*, supra, at 245. "There can only be one home state and therefore, competition for jurisdiction between the states is avoided." Sowald & Morganstern Domestic Relations Law, Sec. 17:36, citing *Rosen*, supra. In order to strengthen the certainty of home-state jurisdiction, the UCCJEA eliminates the review of subjective factors, such as the child's best interests, from the original jurisdictional inquiry that existed in the former version of the UCCJEA. *Rosen*, supra. 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).

{¶38} The two principal sections of the UCCJEA pertinent here are R.C. 3127.15 and R.C. 3127.18. R.C. 3127.15, which governs an Ohio court's jurisdiction to render initial determinations in matters of custody, provides:

{¶39} "(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:

{¶40} "(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 *** continues to live in this state.

{¶41} "(2) A court of another state does not have jurisdiction under division (A)(1) of this section ***, and both of the following are the case:

{¶42} "(a) The child and the child's parents, or the child and at least one parent ***, have a significant connection with this state other than mere physical presence.

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

{¶44} "(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."

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

{¶46} "Thus, the UCCJEA, as codified in Ohio, provides four types of initial child-custody jurisdiction: home-state jurisdiction, significant-connection jurisdiction, jurisdiction based on declination of jurisdiction, and default jurisdiction. R.C. 3127.15(A)(1) through (4)." *Rosen*, supra, at 246.

{¶47} R.C. 3127.15(A)(1) "manifestly confer[s] home-state jurisdiction on the state that either (1) 'is the home state of the child on the date of the commencement of the proceeding' *or* (2) '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

*** continues to live in this state.'" (Emphasis added.) *Rosen*, supra, at 247, quoting R.C. 3127.15(A)(1).

{¶48} "Home state" is defined at R.C. 3127.01(B)(7) 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 *** is counted as part of the six-month *** period*." (Emphasis added.)

{¶49} "Commencement" is defined at R.C. 3127.01(B)(5) as "the filing of the first pleading in a proceeding."

{¶50} "Child custody proceeding" is defined at R.C. 3127.01(B)(4) as "a proceeding in which legal custody *** is an issue."

{¶51} In his complaint for custody, *Gary did not allege that Ohio was B.P.'s home state or that any of the other provisions of R.C. 3127.15 apply*. His complaint was therefore not filed pursuant to R.C. 3127.15, and he did not seek an initial custody ruling under any provision of R.C. 3127.15. Instead, Gary alleged that he "hereby files his complaint for both ex parte and continuing custody of the parties' minor child *** pursuant to O.R.C. Section 3105.03." However, R.C. 3105.03 does not provide for custody; instead, it sets forth the period of time a plaintiff must reside in Ohio before he may file a petition for divorce. Since Gary's complaint did not seek a divorce, his reference to R.C. 3105.03 was obviously in error. In his complaint, Gary asked for an "ex parte order granting him immediate custody of the parties' minor child *** and for an order *** granting him custody after *the emergency* situation has been addressed." (Emphasis added.) Consequently, Gary invoked the juvenile court's temporary emergency jurisdiction under R.C. 3127.18(A). That section provides, in relevant part:

{¶52} "(A) A court of this state has temporary emergency jurisdiction *if a child is present in this state* and either of the following applies:

{¶53} "(1) The child has been abandoned.

{¶54} "(2) It is necessary in an emergency to protect the child because the child *** is subjected to or threatened with mistreatment or abuse."

{¶55} In the juvenile court's February 7, 2011 judgment, it found: "*Under ORC Section 3127.18* this Court had jurisdiction at the time Natural Father filed his request ***." (Emphasis added.) Consequently, the juvenile court expressly found that its jurisdiction was based on R.C. 3127.18. We also note that in the court's September 21, 2011 ex parte order, the court found that the child was dependent, confirming that the court based its decision regarding jurisdiction on an emergency situation. See R.C. 2151.04.

{¶56} While the juvenile court in its February 24, 2011 entry found that it had jurisdiction over the child, the court did not find that B.P. was present in this state on the date Gary filed his custody complaint, i.e., September 16, 2010, or, for that matter, on the date the trial court entered its ex parte order, i.e., September 21, 2010. Of course, the court could not have made such a finding because the undisputed evidence here is that on September 11, 2010, one week before Gary filed his custody complaint, Donna and B.P. returned to Oklahoma.

{¶57} Because the trial court did not find that B.P. was present in this state when Gary filed his custody complaint, there is no set of facts on which the juvenile court could have had temporary emergency jurisdiction. As a result, the court's findings did not satisfy the statutory requirement for acquiring jurisdiction to enter its ex parte order. The jurisdictional defect in the court's entry was thus patent and unambiguous,

rendering the judgment void. As a result, the trial court lacked subject matter jurisdiction under R.C. 3127.18(A) to rule on Gary's complaint. See *Meadows*, supra, at 321. For the same reasons, the juvenile court's subsequent orders are likewise void.

{¶58} Gary's argument in the juvenile court that B.P.'s *past presence* in Ohio satisfied R.C. 3127.18(A) lacks merit because the statute provides that a court has temporary emergency jurisdiction if a child *is* currently present in this state, not if he *was* present in this state at some time in the past.

{¶59} With respect to Gary's request for a permanent custody award, he argued below that the juvenile court had continuing jurisdiction to enter such an award pursuant to R.C. 3127.16. In its February 7, 2011 decision, the court agreed with this argument and found that the court had jurisdiction when Gary filed his complaint and has continuing jurisdiction pursuant to R.C. 3127.16. That section provides:

{¶60} "*** [A] court of this state that has made a child custody determination consistent with [R.C.] 3127.15 *** has *** 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."

{¶61} As noted above, Gary did not allege in his custody complaint *and the juvenile court did not find* that Ohio is the child's home state or that any of the other provisions of R.C. 3127.15 apply. In fact, in Gary's brief in opposition to Donna's motion to dismiss for lack of jurisdiction, Gary argued in the juvenile court that "after the initial determination by [the juvenile] Court under O.R.C. Section 3127.18, Ohio continues to have *** jurisdiction under O.R.C. Section 3127.16." As a result, the juvenile court did not make a child custody determination pursuant to R.C. 3127.15. Thus, the statutory

requirement for continuing jurisdiction has not been met, and the juvenile court patently and unambiguously lacked jurisdiction to find it had continuing jurisdiction.

{¶62} Further, as noted above, in order to prevail on her petition for writ of habeas corpus, Donna must establish that she has a superior legal right to custody. *Bruggeman*, supra. It is undisputed that, while Gary's custody action was pending, Donna filed a child custody proceeding in Oklahoma in which she alleged that Oklahoma was the child's home state. Subsequently, the Oklahoma court entered an order granting temporary, sole custody of B.P. to Donna. R.C. 3127.43 provides:

{¶63} "A court of this state shall accord full faith and credit to an order issued by another state *** 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 ***."

{¶64} There is nothing before us indicating that the Oklahoma court's custody order has been vacated, stayed, or modified. It is, therefore, entitled to full faith and credit. Because we hold that the juvenile court's ex parte order is void and that the Oklahoma court's custody order is entitled to full faith and credit, we also hold that Donna has a superior legal right to custody. *Bruggeman*, supra; *State ex rel. Kanaga v. Lawson*, 11th Dist. No. 2009-L-106, 2010-Ohio-321, at ¶24.

{¶65} In its February 7, 2011 judgment, the juvenile court found that Donna had submitted herself to the court's jurisdiction in Gary's custody case by: (1) returning to Ohio; (2) obtaining employment; and (3) previously filing her petition for domestic violence civil protection order in the domestic relations court. However, pursuant to R.C. 3127.18(A), the juvenile court's subject matter jurisdiction depended on whether B.P. was present in this state when Gary filed his emergency custody complaint.

Because the child was not present, this statutory requirement was not met and the juvenile court lacked subject matter jurisdiction. Thus, whether the foregoing minimum-contact factors were present is irrelevant to the juvenile court's subject matter jurisdiction over Gary's custody complaint.

{¶66} "Neither minimum contacts nor service within the state is required for the state to exercise personal jurisdiction, *nor is jurisdiction conferred because there are minimum contacts or service*. *Jurisdiction is conferred with satisfaction of the requirements of this section of the statute and notice and hearing as required under the UCCJEA*. This is also subject matter jurisdiction and, as such, an agreement of the parties to confer jurisdiction on a court that does not otherwise have jurisdiction cannot be accomplished." (Emphasis added.) Sowald & Morganstern Domestic Relations Law, supra.

{¶67} We further note that, even if the juvenile court had temporary emergency jurisdiction over Gary's custody complaint pursuant to R.C. 3127.18(B), that court would have been divested of jurisdiction upon the entry by the Oklahoma court of its child custody order. R.C. 3127.18(B), regarding temporary emergency custody, provides, in pertinent part:

{¶68} "*If *** a child custody proceeding has not been commenced in a court of a state having jurisdiction under* [*R.C*.] *3127.15* *** [i.e., the child's home 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 [R.C.] 3127.15* *** [i.e., the child's home state]. ***." (Emphasis added.)

{¶69} This court addressed facts similar to those present here in *In re Fluharty*, 11th Dist. No. 2006-T-0016, 2006-Ohio-6529. In *Fluharty*, the child's paternal

grandmother filed a request for temporary emergency custody in the trial court pursuant to R.C. 3127.18(A). The trial court granted the request. While that case was pending, the child's mother filed a child custody proceeding in the child's home state. This court held that, pursuant to R.C. 3127.18(B), the trial court was divested of its temporary emergency jurisdiction upon the filing of the proceedings in the home state. Id. at ¶26.

{¶70} We recognize that Gary disputes Donna's claim that Oklahoma is B.P.'s home state. However, our holding today that the juvenile court's ex parte order is void and that the Oklahoma court's custody order, based on Donna's home-state allegation, is entitled to full faith and credit defeats such challenge.

{¶71} Thus, even if the juvenile court had jurisdiction to enter its ex parte custody order pursuant to R.C. 3127.18(B), that order would only have remained in effect until Donna filed her divorce and custody petition in Oklahoma on September 22, 2010, or, at the latest, when the Oklahoma court entered its child custody order on January 26, 2011.

{¶72} In light of our analysis, we shall next consider the dissent's opinion in support of the juvenile court's jurisdiction. Instead of addressing Gary's actual argument before the juvenile court and this court, the dissent advances five new arguments in support of Gary's position. These arguments were never raised by Gary nor considered by the juvenile court, and each is unavailing.

{¶73} First, the dissent argues that it is unclear Gary knew the code section he was relying on in his complaint for custody. After conceding that R.C. 3127.18 did not confer jurisdiction on the juvenile court, the dissent then attempts to create jurisdiction in the juvenile court under R.C. 3127.15. However, this argument ignores the overwhelming, undisputed evidence: (1) that in his complaint Gary expressly invoked

the juvenile court's emergency jurisdiction, and (2) that the juvenile court expressly found that its initial jurisdiction was based on R.C. 3127.18. We also point out that in Gary's opposition to Donna's motion to dismiss for lack of jurisdiction filed in the juvenile court, Gary stated: "The [juvenile] Court acted on an ex parte or *emergency* motion/complaint and did so for the protection of the child." (Emphasis added.) Thus, contrary to the dissent's argument, Gary expressly requested that the juvenile court exercise emergency jurisdiction under R.C. 3127.18 and the court granted his request.

{¶74} Second, the dissent argues that, while *Oklahoma was B.P.'s home state within the six-month period before Gary filed his complaint*, as required for home-state jurisdiction under the alternative basis for home-state jurisdiction in R.C. 3127.15(A)(1), Oklahoma was divested of its home-state status when the parties left Oklahoma. Contrary to the dissent, we do *not* refer to the alternative basis for home-state jurisdiction as the "expanded version" of home-state jurisdiction. Rather, it is the dissent who makes this reference in his opinion. In any event, what the dissent refers to as "expanded" jurisdiction in R.C. 3127.15(A)(1) is based on a plain reading of the statute and was specifically recognized by the Supreme Court of Ohio in *Rosen*, supra. While the alternative basis for home-state jurisdiction requires that one parent "continue to live" in the home state, there is nothing in the UCCJEA providing that the home state is automatically divested of such status when the parents leave the state.

{¶75} Moreover, the Supreme Court of Ohio implicitly rejected the dissent's argument in *Rosen*, supra. In that case, the Supreme Court adopted the holding of a case decided by the Montana Supreme Court with facts strikingly similar to those present here. In *Stephens v. Fourth Judicial Dist.*, 331 Mont. 40, 128 P.3d 1026, the parents and their minor children lived in Arkansas from 2002 until May 2005, when they

moved to Montana. The parties took steps that indicated they intended the move to Montana to be permanent. The wife then left Montana with the children three months later in August 2005 and returned to Arkansas. Less than six months after moving to Montana, on August 10, 2005, the husband filed a petition for dissolution and custody in Montana. Similar to the dissent's position here, the husband in *Stephens* argued that the children have no home state because Arkansas lost that status when the entire family moved to Montana in May 2005. The Montana Supreme Court rejected this argument and granted a writ of prohibition to the wife to prevent the Montana dissolution action from proceeding because, the Montana court held, Arkansas was the home state of the minor children within six months before the filing of the case. *Rosen*, supra, at 247. The Supreme Court of Ohio quoted with approval the holding of *Stephens*, as follows:

{¶76} "'As a result, we [hold] that "home state" for purposes of determining initial jurisdiction under [the Montana UCCJEA] is not limited to the time period of "6 consecutive months immediately before the commencement of a child custody proceeding." The applicable time period to determine "home state" in such circumstances should be "within 6 months before the commencement of the [child custody] proceeding." [Montana UCCJEA.] This interpretation promotes the priority of home state jurisdiction that the drafters of the UCCJEA specifically intended. The interpretation posed by the District Court and [one of the parents] [that the parties must reside in the home state for six consecutive months immediately before filing] would result in narrowing home state jurisdiction. It would increase the number of potentially conflicting jurisdictional disputes in competing jurisdictions. This result conflicts with the UCCJEA's purpose.' *Stephens*, 331 Mont. 40, 128 P.3d 1026, P 12-13." *Rosen*, supra.

{¶77} The following explanation of the Montana Supreme Court in *Stephens* expressly addressed and rejected the dissent's argument:

{¶78} "The District Court and [the husband] put much stock in the fact that the parties took steps that would imply their intention to make a permanent move to Montana in May 2005. Regardless of their intention, however, the fact remains that [the wife] removed the children from Montana in August 2005 and returned them to their 'home state' of Arkansas at that time. Thus, Arkansas was the children's 'home state' under the UCCJEA when the family came to Montana in May 2005, and *remained their 'home state' when they returned to Arkansas in August 2005*." (Emphasis added.) *Stephens*, supra, at ¶17.

{¶79} Thus, contrary to the dissent's argument, "the linchpin" of Oklahoma's home-state jurisdiction is not "Donna's purported intention to someday return to Oklahoma." Oklahoma was the home state of the child within six months of the filing of Gary's complaint, and Donna *actually* returned to Oklahoma with B.P. before Gary filed his complaint.

{¶80} The dissent's reference to the fact that the parties moved back to their former residence in Ohio; obtained employment here; and that Gary stated in his affidavit that the parties intended the move to be permanent is therefore irrelevant to whether Oklahoma was the child's home state pursuant to R.C. 3127.15(A)(1) because Oklahoma remained the child's home state. As noted above, under R.C. 3127.15(A)(1), such minimum-contact factors play no role in determining whether a state is the child's home state.

{¶81} Further, even if the parties' intent regarding the length of the move was relevant, R.C. 3127.01(B)(7), which, as the dissent concedes, mirrors 43 Okl. St. Sec.

551-102(7), provides in part: "A period of temporary absence of the parent *** is part of the [six-month] period." While Gary stated that the parties intended to remain permanently in Ohio, the overwhelming evidence supports the opposite conclusion. It is undisputed that, during the two-year period prior to May 2010, the parties resided in Oklahoma in a home they owned in that state. Gary and Donna were employed in Oklahoma and attended school there. Donna's family resides in Oklahoma. The parties only left Oklahoma because of the foreclosure there. Further, when the parties returned to Ohio, they left their furnishings and belongings in storage in Oklahoma. Therefore, contrary to the dissent's position, if the issue was relevant, these undisputed facts inexorably lead to the conclusion that the parties' move to Ohio was meant to be temporary.

{¶82} The dissent's view that Donna's four-month absence from Oklahoma should not count toward the six-month requirement for Oklahoma to acquire jurisdiction misconstrues R.C. 3127.15(A)(1). Oklahoma was already B.P.'s home state as of May 2010, when the parties left Oklahoma because they had lived there more than two years. Because Oklahoma did not automatically lose its home-state status when the parties left, *Rosen*, supra; *Stephens*, supra, Oklahoma did not need to count the parties' four-month stay in Ohio in order to achieve home-state status; Oklahoma already had that status.

{¶83} Third, in a related argument, the dissent contends that Oklahoma lost its home-state status because Donna did not "continue to live" in Oklahoma, as required by the alternative provision of R.C. 3127.15(A)(1). However, it is undisputed that Donna returned to Oklahoma with B.P. on September 11, 2010, before Gary filed his complaint. Any doubt in that regard is dispelled by Gary's complaint in which he acknowledged that

Donna had already returned to Oklahoma with B.P. Pursuant to *Stephens*, supra, and *Rosen*, supra, Donna's return to Oklahoma with B.P. before Gary filed his complaint satisfied the requirement that one parent continue to live in the home state. We note that, but for Gary's following Donna and B.P from Ohio to Oklahoma and then to South Carolina and taking the child after Gary had Donna arrested, Donna and B.P. would have presumably continued to reside in Oklahoma. This is exactly the type of gamesmanship the UCCJEA was designed to avoid.

{¶84} Fourth, the dissent asserts that the juvenile court's ruling it had jurisdiction is justified by its finding that neither Oklahoma nor Ohio is the child's home state and the parties were physically present in Ohio between May and September 2010. The dissent therefore asserts that the juvenile court's jurisdiction was based on significant-connection jurisdiction pursuant to R.C. 3127.15(A)(2). However, because Oklahoma is B.P.'s home state, significant-connection jurisdiction is irrelevant.

{¶85} Fifth, the dissent argues that a hearing was necessary "to clarify the competing factual contentions." We do not agree. There is no factual dispute regarding the only basis for jurisdiction asserted by Gary in this case: temporary emergency jurisdiction pursuant to R.C. 3127.18. As noted above, Gary himself argued in the juvenile court that the juvenile court had acted on his "emergency motion/complaint and did so for the protection of the child." No matter how many arguments the dissent attempts to make to create jurisdiction in the trial court, the only jurisdiction Gary ever attempted to invoke and the only initial jurisdiction the juvenile court exercised was temporary, emergency jurisdiction pursuant to R.C. 3127.18. Since there is no factual dispute that Donna had taken B.P. to Oklahoma before Gary filed his complaint, the

absence of the child from Ohio as a matter of law prevents jurisdiction in the juvenile court under the emergency statute, and no hearing is necessary.

{¶86} In light of the foregoing analysis, Gary's motion to dismiss is overruled and Donna's petition for writ of habeas corpus is granted.

MARY JANE TRAPP. J., concurs,

TIMOTHY P. CANNON, P.J., dissents with Dissenting Opinion.

TIMOTHY P. CANNON, P.J., dissenting.

{¶87} I respectfully dissent from the opinion of the majority. I believe the Ohio court properly invoked jurisdiction to enter the September 21, 2010 order. As the juvenile court had jurisdiction to enter this order, the Ohio court should proceed to a final disposition of this custody matter.

{¶88} As noted by the majority, R.C. 3127.15 governs an Ohio court's jurisdiction to render initial determinations in matters of custody. It provides:

{¶89} "(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:

{¶90} "(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.*

{¶91} "(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:

{¶92} "(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.

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

{¶94} "(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.

{¶95} "(4) No court of any other state would have jurisdiction under the criteria specified in division (A)(1), (2), or (3) of this section." (Emphasis added.)

{¶96} Therefore, the UCCJEA, as codified in Ohio, provides four types of initial child-custody jurisdiction: home-state jurisdiction [R.C. 3127.15(A)(1)], significant-connection jurisdiction [R.C. 3127.15(A)(2)], jurisdiction because of declination of jurisdiction [R.C. 3127.15(A)(3)], and default jurisdiction [R.C. 3127.15(A)(4)].

{¶97} The majority asserts there cannot be more than one home state. While that is certainly correct, it is also correct that there may be no home state. Otherwise, there would be no need for the existence of R.C. 3127.15(A)(2), (A)(3), or (A)(4).

{¶98} As defined in R.C. 3127.01(B)(7),[1] "home state" is "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."

{¶99} In his complaint for custody, Gary referred to R.C. 3105.03, which governs jurisdiction in an action for divorce or annulment. Clearly, this section is inapplicable. It is not clear Gary knew the code section he was relying upon in his complaint for custody. Therefore, this court is required to determine the appropriate code section upon which to conduct its analysis.

{¶100} The majority notes that Gary, in his complaint for custody, did not allege that Ohio was B.P.'s home state or that any other provisions of R.C. 3127.15 apply. The majority concludes that "[h]is complaint was therefore not filed pursuant to R.C. 3127.15, and he did not seek an initial custody ruling under any provision of R.C. 3127.15." In his complaint, Gary did not claim custody under 3127.18 either, yet the majority proceeds with an analysis of R.C. 3127.18, the statute governing "temporary emergency jurisdiction." I agree with the conclusion of the majority that R.C. 3127.18 clearly does not confer jurisdiction since it requires B.P. to be present in Ohio at the time the order is entered. Further, the juvenile court was aware, from the face of Gary's complaint, that B.P. and Donna were in Oklahoma at the time he filed his custody complaint.

1. See 43 Okl. St. § 551-102 (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 (6) consecutive months immediately before the commencement of a child custody proceeding. *** A period of temporary absence of the parent or person acting as a parent is part of the period."

{¶101} Of significance is the fact that the Ohio court did issue an ex parte order granting custody on September 21, 2010. If the court properly invoked jurisdiction in this order, then it has continuing jurisdiction under R.C. 3127.16.

{¶102} There is more than one way for Ohio to have jurisdiction under R.C. 3127.15 to the exclusion of any other state. The Supreme Court of Ohio has recognized the distinctions in language contained in the UCCJEA, as reflected in R.C. 3127.15(A)(1), and the definition of "home state," as defined in R.C. 3127.01(B)(7). *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, at ¶34. The Court noted that R.C. 3127.15(A)(1) "manifestly confers home-state jurisdiction on the state that either (1) 'is the home state of the child on the date of the commencement of the proceeding' or (2) '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.'" Id., citing R.C. 3127.15(A)(1). See, also, the Uniform Child Custody Jurisdiction and Enforcement Act at Title 43, Okla. Stat. Ann., 551-201(A)(1).

{¶103} Clearly, Ohio could not be the home state of B.P., as he failed to live here for six consecutive months immediately preceding the September 2010 commencement of the child custody proceeding; nor was Ohio the home state of B.P. within the six months before the commencement of the proceeding. R.C. 3127.15(A)(1).

{¶104} Although the majority asserts that Oklahoma was B.P.'s home state, the requirements for home-state jurisdiction under the UCCJEA are not met and thus do not confer home-state jurisdiction on Oklahoma. First, Oklahoma was not the home state of B.P. on the date of commencement of the proceeding. The facts reveal that Donna had lived in Ohio for nearly four months; the parties moved back to their home on Stiles

Street in Warren, Ohio; the parties obtained employment in Ohio; and their home in Oklahoma had been foreclosed upon. Further, according to Gary's affidavit attached to his ex parte custody complaint, the parties' intention was to establish their home in Ohio. While a temporary absence of a parent from the home state may be counted as part of the six-month period, it would be unreasonable, in light of the facts of this case, to determine that Donna's four-month absence from Oklahoma would count toward this six-month requirement.

{¶105} The only way Oklahoma could be considered the home state is pursuant to what the majority refers to as the "expanded version" of the definition in the second part of R.C. 3127.15(A)(1). The threshold for this expanded version, as required by its plain language, is that one parent "continues to live" in the home state during the absence of the child.

{¶106} Donna's purported intention to someday return to Oklahoma is the linchpin of the majority's analysis in conferring "home state" jurisdiction on Oklahoma. However, in departing from the factual finding of the trial court on this point, the majority is "inexorably lead to the conclusion that the parties' move to Ohio was meant to be temporary" because they left some furniture behind in Oklahoma. That is quite an assumption in a case being decided in summary fashion without the benefit of a hearing or testimony. Certainly, there are many other reasons why the parties may have left their furniture in storage.

{¶107} The majority states "there is nothing in the UCCJEA providing that the home state is automatically divested of such status *when the parents* leave the state." (Emphasis added.) This is not correct. If *both* parents and the child leave the state, Oklahoma could not be the home state by definition, and it could not be the home state

under the *expanded version*, espoused by the majority, in the second part of R.C. 3127.15(A)(1). Although Oklahoma was the home state of B.P. within six months before the commencement of the proceeding, "a parent or person acting as a parent" did not continue to live in Oklahoma, as required by the plain language of the statute. This is evidenced by Gary's complaint, filed September 16, 2010, which states the parties "had been residing in Ohio since May 2010[.]"

{¶108} The lead opinion indicates that the Supreme Court of Ohio, in *Rosen*, supra, adopted the holding of a case decided by the Montana Supreme Court, *Stephens v. Larson*, 2006 MT 21, 331 Mont 40. The majority relies upon *Rosen* to suggest that "the Supreme Court of Ohio implicitly rejected" the position that the UCCJEA requires a parent or person acting as a parent to remain in the former state for the former state to retain home-state status. The majority opinion is under the misconception that the Supreme Court in *Rosen* actually considered, let alone rejected, this exact argument.

{¶109} The issue in *Rosen* was whether West Virginia or Ohio was the home state. The parties had lived with their four children in West Virginia for approximately 13 years. Wife then moved from West Virginia to Ohio with the parties' two youngest children. Notably, husband stayed in West Virginia with the other minor children. Approximately four months later, wife filed a complaint for, inter alia, divorce, child support, and allocation of parental rights and responsibilities; husband filed a competing petition in West Virginia. The Ohio court exercised its jurisdiction based on the conclusion that West Virginia also lacked home-state jurisdiction because West Virginia was not the home state of any of the minor children for six consecutive months *immediately preceding* the commencement of father's West Virginia divorce

proceedings. Therefore, the Ohio court asserted that it had significant-connection jurisdiction under R.C. 3127.15(A)(2). *Rosen*, supra, at ¶2-39.

{¶110} In finding the Ohio court's argument to be without merit, the Supreme Court identified the conflict between R.C. 3127.15(A)(1) and R.C. 3127.01(B)(7). It resolved this conflict by determining that home-state jurisdiction is not limited to the date the action was commenced. Rather, it interpreted the definition of home state more broadly, reasoning that any other reading would render the language of R.C. 3127.15(A)(1) meaningless. Although similar in facts, the Supreme Court did not cite *Stephens* for the proposition that the majority contends—that is, if both parents leave the former state, the former state does not lose its home-state status. Rather, the Supreme Court cited *Stephens* to support its resolution of not limiting the time period to the date the action was commenced. *Rosen*, supra, at ¶34-39.

{¶111} Further, it is important to note that, in the following paragraph, the Supreme Court cited to other courts that "have addressed this issue" and have "reached a similar holding." Id. at ¶40. *Lebejko v. Lebejko* (2007), 42 Conn.L.Reptr. 760, 2007 Conn. Super. LEXIS 602, *5 ("when children move with a parent from a state with home state status to another state the former state does not lose its home state status if the other parent resides there until the children have lived in the new state for six months, at which point that state has acquired home state status"); *Thomas v. Arkansas Dept. of Human Servs*. (Ark.App.2005), 2005 Ark. App. LEXIS 305, *3 ("Illinois was the child's home state under the Arkansas UCCJEA because 'it was the child's home state within six months before the commencement of the proceeding and the maternal grandparents, who acted as parents to the child, continue to live there'"). Significantly, these cases do not uphold the same principle as *Stephens*. Instead, each of these

cases cited to by *Rosen* involve a scenario where one parent or person acting as a parent *remained* in the state with home-state status. Consequently, there seems to be some ambiguity in the Supreme Court's analysis. At best, any cases cited are dicta.

{¶112} I believe the majority inaccurately characterizes the Supreme Court's ruling in *Rosen* to the extent that it states the Supreme Court has adopted *Stephens* for the proposition that when both parents leave a state with home-state status that state does not lose its status within six months before the commencement of the proceedings. Notably, the Supreme Court of Ohio, in *In re Adoption of Asente* (2000), 90 Ohio St.3d 91,102, has stated that "a child's home state is the state the child resided in for a period of six consecutive months immediately preceding the commencement of a custody proceeding *or* the state where a child lived within six months before the commencement of a custody proceeding and the child is absent from the state because a person claims to have custody of the child in another state, *and a contestant continues to reside in this state*." (Emphasis added.) Courts have recognized that this expansive interpretation of home state under the UCCJEA "is intended to address those instances when one parent leaves the home state of the child with the child. In those instances, that parent remaining in what was the home state of the child has a window of opportunity to petition a court for relief." *In the Matter of Christine L. v. Jason L*., 2009 NY Slip Op 29089, 23 Misc. 3d 1039, 1043; *Dalessio v. Gallagher*, 414 N.J. Super. 18, 25, 997 A.2d 283, 288.

{¶113} The end result of the *Rosen* case is that the Supreme Court recognized it was important that one parent remained in the former home state, as required by the clear language of the statute.

{¶114} Here, Oklahoma cannot be the home state of B.P under the UCCJEA, as one parent did not continue to live in Oklahoma. Any other interpretation would negate the plain language of the UCCJEA and render the language requiring a parent or person acting as a parent to continue to live within the home state superfluous.

{¶115} The emphasis on the Montana *Stephens* case by the majority significantly clouds the basis of their rationale. Neither the Montana court, nor the majority here, *ever* addresses what to do with the plain language of the statute *requiring* one parent to remain in the former home state. It is unclear whether the majority has decided to simply ignore this requirement, or, as it suggests elsewhere in the opinion, that it believes Donna's move to Ohio was meant to be "temporary."

{¶116} Although the juvenile court was aware that Ohio was not B.P's home state, it issued an ex parte order granting custody and then subsequently issued a February 24, 2011 judgment entry, stating:

{¶117} "[N]either party was a resident of Oklahoma at the time of their mutual and competing filings in September 2010. Ohio was the residence of the parties and child from May 2010 to September 2010. As a result of their physical presence here and their court filings in September 2010, any jurisdiction by Oklahoma was lost."

{¶118} In its opinion, the majority asserts two fundamental errors in the juvenile court's February 24, 2011 order. Contrary to the majority's opinion, I do not believe the juvenile court conflated the concepts of personal jurisdiction and subject matter jurisdiction. Instead, the entry reflects the juvenile court's understanding that neither Ohio nor Oklahoma meets the definition of home state under the UCCJEA. However, because B.P. lived in Ohio for approximately four months immediately preceding Gary's initial filing, Ohio had significant-connection jurisdiction pursuant to R.C. 3127.15(A)(2)

and there is no court of another state that qualified under R.C. 3127.15(A)(1). The trial court recognized this when it noted that all parties were physically present and lived in Ohio between May and September 2010. Therefore, the last requirement of (A)(1), that one of the parents had remained in Oklahoma, was not met.

{¶119} Moreover, the majority notes that even if the juvenile court had jurisdiction pursuant to R.C. 3127.18(B), it would have been divested of jurisdiction "upon the entry by the Oklahoma court of its child custody order." The majority reasons that this order would have remained in effect until an order was obtained from a court of a state having jurisdiction under R.C. 3127.15 or from the child's home state. It then cites to this court's holding in *In re Fluharty*, 11th Dist. No. 2006-T-0016, 2006-Ohio-6529, at ¶26, stating: "[t]his court held that, pursuant to R.C. 3127.18(B), the trial court was divested of its temporary emergency jurisdiction upon the *filing of the proceedings in the home state*." (Emphasis added.) However, it is critical to note that in *Fluharty*, it was uncontroverted that the home state of the children was Louisiana—the mother of the minor children remained in Louisiana when the children came to Ohio to visit their paternal grandmother. Id. at ¶1-4. Thus, Louisiana had jurisdiction under the UCCJEA.

{¶120} I agree with the majority's analysis regarding our ability to proceed with a habeas petition while the case remains pending in the trial court. I agree that we could only proceed if the trial court patently and unambiguously lacked any jurisdiction to issue its custody order on September 21, 2010. **That is, this relief should only be granted "if there are *no* facts under which a trial court *** could have jurisdiction."**

{¶121} Clearly, there are facts under which the trial court could have jurisdiction in this case. Oklahoma can only be the home state under two scenarios, one of which is factually disputed. First, Oklahoma can be the home state if it is *undisputed* that

Donna's move to Ohio was a "temporary absence" as contemplated by the home state definition in R.C. 3127.01(B)(7). However, as the majority notes, the parties moved here, obtained employment here, and Gary has alleged "the parties intended to remain permanently in Ohio." Because of the fact this issue is disputed, this petition should not be granted. The second scenario, which *is* clear and undisputed, is that Donna did not "continue to live" in Oklahoma as required by the second test in R.C. 3127.15(A)(1). The majority addresses this issue by simply stating that Donna *returned* to Oklahoma in September 2010. By stating that Donna *returned* to Oklahoma, it is an acknowledgement that she did not "continue to live" there.

{¶122} The majority claims this dissent has ignored "the overwhelming, undisputed evidence *** that in his complaint Gary invoked the court's emergency jurisdiction." The majority concludes Gary's petition could *only* be considered under R.C. 3127.18. I disagree. R.C. 3127.18 does not apply when the child is out of state. However, when there is an emergency and the child *is* out of state, R.C. 3127.15 is a very proper statute to employ. There is nothing in R.C. 3127.15 that suggests the request for custody *cannot* be filed in an emergency situation. The fact that neither the movant nor the trial court cited any section of the code in the motion or the grant of the order is *not* fatal to the jurisdictional question.

{¶123} The majority also places significance on the fact that jurisdiction under 3127.15 was not raised by either party. However, this matter is not an appeal. This is an original action where we are required to determine if *there are no facts* that would permit the trial court to have exercised jurisdiction. The statement by the majority that this dissent is attempting to "create" jurisdiction under R.C. 3127.15 is perplexing. In

this type of case, if there is jurisdiction, we are bound to find it, not to ignore it because it was not properly characterized in a pleading.

{¶124} The relief afforded here is extraordinary. The only motion pending before this court is a Motion to Dismiss *filed by the respondent*. There is no dispositive motion before this court seeking a summary grant of the petition. I believe it is not appropriate to make the assumptions made by the majority in a summary fashion such as this without the benefit of any hearing or testimony to clarify the competing factual contentions. The trial court has already made findings that the parties' move to Ohio was not "temporary" as contemplated by the statute and that no parent remained in Oklahoma. Because there are obvious facts that permitted the court in Ohio to accept jurisdiction, its order should not be disturbed by this court in a summary habeas proceeding. However, as a result of the majority's decision, this child will be taken to Oklahoma without the benefit of any guidance from a guardian ad litem, a counselor, school officials, or a home study analysis of the place he will be going.

{¶125} Therefore, in holding the Ohio court lacked jurisdiction, the majority has necessarily determined that one or both of the following are true: (1) moving to another state and establishing new residence and employment for four months is a "temporary absence" from the home state as contemplated by the definition of "home state" found in R.C. 3127.01; and/or (2) the portion of 3127.15(A)(1) that requires a parent to "remain" in the home state is not a requirement at all, or is satisfied if the parent moves from the home state, establishes residency and employment in another state, then moves back to the former state.

{¶126} I believe these interpretations are capable of producing results that are completely contrary to the intention of the UCCJEA. Contrary to the contention of the

majority that the position it espouses will lead to fewer territorial disputes, just the opposite is true. The statute clearly intends to give status to a state where *all parties* have moved to, and avoid the scenario that occurred here where one party can unilaterally return to a former state, where there may be no ties whatsoever to the family.