

BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE THE MARRIAGE OF:

KATHLEEN R. ROSEN

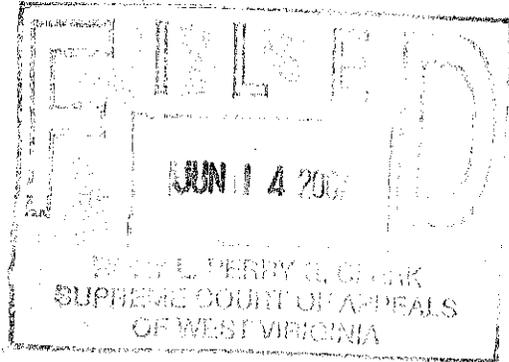
Appellant,

vs.

DAVID A. ROSEN,

Appellee.

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CASE NO. 070600

33437

BRIEF OF APPELLANT, KATHLEEN R. ROSEN

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I. KIND OF PROCEEDING AND RULING IN LOWER COURT

This is a divorce case arising in the Circuit Court of Monongalia County, West Virginia. Judge Russell M. Clawges, Jr., Circuit Judge of the Circuit Court of Monongalia County, affirmed the "Order Retaining Jurisdiction Over Child Custody" issued by James Jeffrey Culpepper, Family Court Judge of Monongalia County, West Virginia. Appellant appeals the Circuit Court's Affirmation of Family Court's ruling retaining jurisdiction over the issue of custody of the three (3) infant children of the parties, Abigail Rosen, Gillian Rosen and Rachel Rosen.

II. STATEMENT OF FACTS

Kathleen Rosen (hereinafter "Appellant") and David Rosen (hereinafter "Appellee") were married on December 1, 1979 in Arlington, Virginia. Four (4) children were born as issue of the marriage: Madeleine Rosen (D.O.B.: 1/7/87), Abigail Rosen (D.O.B.: 5/27/91), and twins Gillian Rosen (D.O.B.: 2/8/94) and Rachel Rosen (D.O.B.: 2/8/94).

The parties, together with their children, resided in West Virginia from May of 1992 until late November/early December of 2005. Both parties are physicians and worked in the field of Pediatric Anesthesia. However, Appellant's active involvement in the workforce was minimal following the birth of the parties' twin daughters in 1994. The parties agreed that Appellant was to assume the role of primary caregiver of the parties' children. As the children became older, Appellant steadily reintegrated herself into the workforce, returning to full-time employment in July of 2004. It was understood by both parties that Appellee's progressing Post-Polio Syndrome would eventually lead to Appellant assuming the role of primary financial provider. In anticipation of Appellee's advancing disease, in the fall of 2004, the parties began discussing the possibility of Appellant pursuing a position outside of West Virginia. In March of 2005,

Appellant interviewed for a position with the Mt. Sinai Skills and Simulation Center of the Case Western Reserve School Medicine, which would require the parties to relocate with their children to Cleveland, Ohio. After numerous interviews, Appellant was offered the position and the parties began preparing for the move.

In August of 2005, the parties began searching for housing in the Cleveland area. While Appellant assumed primary responsibility for this task, Appellee traveled to Cleveland to assist her in this process. In addition, Appellee began making arrangements to sell the marital residence in West Virginia. Appellant, with Appellee's consent, entered into a purchase agreement to purchase a home in Beachwood, Ohio. The purchase agreement was signed on or about September 15, 2006. Appellee assisted Appellant in arranging financing for the purchase. In addition, Appellee signed the mortgage deed waiving dower in the home (Exhibit 1)¹. The purchase closed on November 15, 2005. On December 1, 2005, Appellant, Gillian and Rachel relocated to Ohio. At the time of the move, Madeleine (emancipated) was attending Penn State University and Abigail (a minor) was in boarding school in Connecticut. Appellee came to Ohio on December 1st with Appellant and the twins to assist with the move. However, Appellant believed that he returned to West Virginia to transition his hospital staff for his departure and to sell the parties' West Virginia home. Since the relocation, Appellant, Gillian and Rachel have resided in Cuyahoga County, Ohio. Appellee has made frequent trips to the Beachwood home, visiting and picking up Gillian and Rachel for visitation.

Even before the family's move to Ohio, Appellant and Appellee took affirmative steps to integrate themselves and the parties' children into the Cleveland area. Before the move and at

¹ Reference to the Exhibits in the Statement of Facts are the Exhibits attached to Appellant's Motion to Dismiss the Complaint and Transfer Case under the UCCJEA to Ohio and also attached to the Memorandum of Law by Appellant in Support of Petition for Appeal of Decision of Family Law Judge to Take Jurisdiction of Child Custody Issues.

Appellee's request, the parties enrolled Gillian and Rachel at Hathaway Brown, a private school in Ohio. Appellee paid for the children's enrollment and tuition. Two checks signed by Appellee for the twins' tuition were marked Exhibit 2. In addition to enrolling the children at Hathaway Brown, Appellee and Appellant jointly executed numerous documents identifying the Beachwood, Ohio address as the children's place of residence, including but not limited to, transfer forms transferring Rachel and Gillian's orthodontic care to an Ohio orthodontist (Exhibit 3), and a Registration form for Rachel to attend a figure skating competition (Exhibit 4). In addition, Appellee prepared an on-line application for Gillian to attend the Johns Hopkins University Center for Talented Youth (Exhibit 5). Appellee listed the Beachwood, Ohio home as Gillian's address.

It was not until March, 2006, that Appellee indicated that he no longer intended to relocate to Ohio. Because of certain threats Appellee made to Appellant concerning a divorce and the children, Appellant filed a Complaint in the Court of Common Pleas, Division of Domestic Relations, Cuyahoga County, Ohio, for Legal Separation, Spousal Support, Child Support, Attorney's Fees, Allocation of Parental Rights and Responsibilities, Restraining Orders and Further Legal and Equitable Relief, Case Number DR-06-309951. Appellee was served personally in Beachwood, Ohio, with the Summons and Complaint on April 6, 2006.

On or about April 27, 2006, Appellee filed a Petition for Divorce and Motion for Expedited Hearing in the Family Court of Monongalia County, West Virginia, Civil Action No. 06-D-1645. Appellee also filed a Motion to Dismiss in the Ohio Court on May 12, 2006. On May 16, 2006, Appellant filed a Motion to Exercise Jurisdiction over the child custody issues in the Cuyahoga County, Ohio, Domestic Relations Court. Appellant filed a Motion to Dismiss the Complaint and Transfer Case under the Uniform Child Custody Jurisdiction and Enforcement

Act (hereinafter "UCCJEA")² to Ohio in the West Virginia Court on May 22, 2006, and filed a supporting Memorandum of Law with Exhibits on May 24, 2006.³ By Order dated June 6, 2006, the Domestic Relations Court of Cuyahoga County, Ohio, entered an Order taking jurisdiction of this case with regard to the custody of the three (3) children under the Ohio UCCJEA finding that Ohio was a more convenient forum to hear the issue involving the custody of the minor children, and Appellee had waived his rights under the Ohio UCCJEA by agreeing to the relocation of Appellant and the minor children to the State of Ohio. That Order was attached to the Petition for Appeal as Exhibit A. On July 13, 2006, Appellant's attorney in Ohio filed Interrogatories and Requests for Production of Documents upon Appellee's attorney in Ohio.

By Order dated August 9, 2006, the Family Court of Monongalia County, West Virginia, entered an Order Retaining Jurisdiction Over Child Custody of the three (3) children of Appellant and Appellee, which Order was attached to the Petition for Appeal as Exhibit B. By Order dated October 31, 2006, the Ohio Court designated Appellant as the temporary residential parent of the three (3) minor children and allocated parenting time through June, 2007. A copy of that Order was attached to the Petition for Appeal as Exhibit C. By another Order dated October 31, 2006, the Ohio Court appointed Pamela Gorski as Guardian Ad Litem and counsel for the three (3) minor children. A copy of that Order was attached to the Petition for Appeal as Exhibit D. By Order dated October 24, 2006, the Circuit Court of Monongalia County, West Virginia, affirmed the Family Court decision. The Family Court Judge of Monongalia County, West Virginia, held a hearing on December 6, 2006. He adopted the Parenting Plan of Ohio entered by Order dated October 31, 2006, but stated that if the Writ of Prohibition filed by Appellee is granted in Ohio, he would adopt the Parenting Plan submitted by Appellee but gave

² The Uniform Child Custody Jurisdiction Act is referred to herein as the "UCCJA".

³ The Exhibits are identified in the Statement of Facts.

the attorney for Appellant ten (10) days to file objections as to why that Plan should not be adopted. Appellant's attorney did file objections to Appellee's Parenting Plan and submitted a revised proposed Parenting Plan. The Family Court Judge has not entered any Order from the hearing held on December 6, 2006.

The Family Court of Monongalia County held another hearing on March 5, 2007. At that hearing, Teresa Lyons was appointed Guardian Ad Litem for the three (3) minor children. The Court set another hearing on April 20, 2007, to adopt a Temporary Parenting Plan for the three (3) minor children. The Ohio Order of October 31, 2006, involving a Parenting Plan for the three (3) minor children, contained no provisions beyond June 30, 2007. The Family Court of Monongalia County made it clear that he was taking jurisdiction of this issue after that date. The Order, which was entered April 6, 2007, is attached to this Brief as Exhibit No. 1. A separate Order dated March 7, 2007, ordered the parties to mediate this case. A copy of that Order is attached to this Brief as Exhibit No. 2.

Prior to the hearing on April 20, 2007, the parties did engage in mediation with Dr. Ronald Pearse in Fairmont, West Virginia. Dr. Pearse reported that the parties had agreed on a Temporary Parenting Plan for the three (3) minor children. The Appellant was in agreement with the mediator. The Appellee denied that there had been an agreement unless the Family Law Judge ruled that the twins did not have to return to West Virginia at the conclusion of their school year in which case he was in agreement with the Temporary Parenting Plan prepared by Dr. Ronald Pearse. The Appellee did not agree that there had been any Temporary Parenting Plan involving their daughter, Abigail.

At the hearing on April 20, 2007, Appellee's attorney reported to the Court that they had decided to accept the proposed Temporary Parenting Plan prepared by the mediator with regard

to the twins but that there was no agreement with regard to their daughter, Abigail. The Court, after hearing proffered testimony by the parties and argument of counsel, entered a Temporary Parenting Plan with regard to Abigail and adopted the mediated Temporary Parenting Plan with regard to the twins, Gillian and Rachel. The Court ordered Appellee's attorney to prepare the Order. As of this date, no Order has been prepared and filed with the Court. When this Court granted the appeal, it also granted the Motion to Stay the Enforcement of any Order from the Family Court of Monongalia County.

By Order dated May 9, 2007, the Ohio Court extended the October 31, 2006, Temporary Order with regard to the three (3) minor children and adopted certain visitation schedules that Appellee would have with the twins and that both parents would have with Abigail (she still attends private boarding school in Connecticut) for the period through the end of 2007. A copy of that Order is attached to this Brief as Exhibit No. 3. Had the West Virginia Order from the hearing on April 20, 2007, been prepared and entered, it would be in conflict with part of the Order entered by Ohio on May 9, 2007.

III. ASSIGNMENT OF ERROR

1. The Court abused its discretion in failing to give the Ohio Court Order full faith and credit.
2. The Court abused its discretion in failing to find that Ohio was the most convenient forum under the UCCJEA.
3. The Court abused its discretion by failing to require the Judge of the Family Court of Monongalia County, West Virginia, to have direct communication with the Domestic Relation Judge of the Common Pleas Court of Cuyahoga County, Ohio Court before taking jurisdiction of this case.

IV. POINTS AND AUTHORITIES RELIED UPON

- West Virginia Code §48-10-6 (now abolished)
- West Virginia Code §48-10-7(d) (now abolished)
- West Virginia Code §48-20-110
- West Virginia Code §48-20-201
- West Virginia Code §48-20-206
- West Virginia Code §48-20-207
- Ohio Revised Code Section 2301.03 (L) (1)
- Ohio Revised Code Section 3109.04
- United States Constitution, Article IV, Section 1
- Burnside v. Burnside, 194 W.Va. 263, 460 S.E.2d 264 (1995)
- Evans Geophysical, Inc. v. Ramsey Associated Petro, Inc., 217 W.Va. 45, 614 S.E. 2d 692 (2005)
- Estate of Cook v. Cook, 199 W.Va. 309, 484 S.E. 2d 192 (1997)
- Filsinger v. Filsinger, 2006 WL 1992422 (Tex. 2005)
- Haller v. Haller, 198 W.Va. 487, 481 S.E.2d 793 (1996)
- Hamilton v. Washington, 2005 W.L. 1654017 (KY 2005)
- Harshbarger v. Harshbarger, 724 N.W.2d 148, (ND 2006)
- Hickey vs. Baxter, 461 So.2d 1364 (Fla. 1984)
- In Re Absher Children, 141 Ohio App.3d 118, 126 (2001), 750 N.E.2d 188
- In Re Adoption of Asente, 90 Ohio St.3d 91, 734 N.E.2d 1224 (2000)
- In Re Interest of L.C., 18 Kan. App.2d 627, 857 P.2d 1375 (1993)
- In RE McCoy, 52 S.W.3d 297 (Tex. 2001)

In Re Sklenchar, unreported, case number 04 MA 55 (Mahoning County, Aug. 18, 2004)

In Re S.L.M., unreported, case number M 2005-02423-COA-R9-JV (Tenn. Ct. of App. Apr. 25, 2006)

Interest of Brandon L. E., 183 W.Va. 113, 394 S.E.2d 515 (1990)

In the Matter of the Bureau of Support v. Brown, unreported, case number 00AP0742 (Carroll County Ct. of App., Ohio, November 6, 2001)

In the Matter of Joshua Ghader, unreported, case number 94-CA-15 (Hocking County, Ohio, 1995)

Johnson v. Huntington Moving and Storage, Inc., 160 W.Va. 796, 239 S.E.2d 128 (1927)

Kelm v. Kelm, 92 Ohio St. 3d 223, 226 (2001)

Loper v. Loper, 126 Ariz 14, 612 P.2d 65 (1980)

Mayor v. Mayor, 595 N.E.2d 436 (Ohio App. 1991)

Miller vs. Henry, unreported, case number 02 AP-673 (Franklin County, Ohio, Mar. 27, 2003)

Nazar v. Nazar, 505 N.W.2d 628 (Minn. App. 1993)

Norsworthy v. Norsworthy, 713 S.W.2d 451 (Ark. 1986)

Phillips v. Beaber, 995 S.W.2d 655 (Tex. 1999)

Pratts v. Hurley, 102 Ohio St. 3d 81, 83 (2004)

Rock v. Rock, 197 W.Va. 448, 475 S.E.2d 540 (1996)

Rodriquez v. Frieze, unreported, case number 04 CA 14 (Athens County, Dec. 17, 2004)

Saavedra v. Schmidt, 96 S.W.3d 533 (Tex. 2002)

Sandra M. vs. Jeremy M., 197 W. Va. 542, 476 S.E.2d 213 (1996)

Schrader v. Schrader, 196 W.Va. 649, 474 S.E.2d 579 (1996)

Sherry L. H. v. Stephen L. H., 195 W.Va. 384, 465 S.E.2d 841 (1995)

State ex rel Bubrycki v. Hall, 202 W.Va. 335, 504 S.E. 2d 162 (1998)

State ex rel. Conforti vs. Wilson, 203 W.Va. 21, 506 S.E.2d 58 (1998)

State ex rel. Tubbs Jones v. Suster, 84 Ohio St. 3d 70, 75 (1998)

West Virginia Department of Health and Human Resources ex rel. Sharron Hisman v. Angela D., et al., 203 W.Va. 335, 507 S.E.2d 698 (1998)

Zimmerman v. Newton, 569 N.W.2d 700 (N.D. 1997)

V. DISCUSSION OF LAW AND ARGUMENT

A. STANDARD OF REVIEW

The standard for reviewing recommended orders of Family Law Masters (now Family Law Judges) is defined in Syllabus 2 of Sherry L. H. v. Stephen L. H., 195 W.Va. 384, 465 S.E.2d 841 (1995):

"A circuit court should review findings of fact made by a family law master only under a clearly erroneous standard, and it should review the application of law to the facts under an abuse of discretion standard."

In Burnside v. Burnside, 194 W.Va. 263, 460 S.E.2d 264 (1995), the Supreme Court established the same standard in reviewing recommendations of the Family Law Master which were adopted by the Circuit Court when it stated in Syllabus 1:

In reviewing challenges to findings made by a family law master that were also adopted by the Circuit Court, a three-prong standard of review is applied. Under these circumstances, a final equitable distribution order is viewed under an abuse of discretion standard; underlying factual findings are viewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to *de novo* review.

This standard of review for the Supreme Court was reaffirmed with regard to all issues in a divorce case in Syllabus 1 of Schrader v. Schrader, 196 W.Va. 649, 474 S.E.2d 579 (1996):

This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.

Based upon these standards, the issues that are being appealed in this case involving the failure of the Family Law Judge to communicate with the Judge of the Ohio Court, the Court's failure to give full faith and credit to the Ohio Court's Order regarding jurisdiction, and the Court's failure to follow the UCCJEA should be reviewed under the abuse of discretion standard. The question of fact involving the "home state" and "significant communication" tests should be reviewed under the clearly erroneous standard as it relates to the Court's final order and ultimate disposition involving the issue of which court should take jurisdiction to hear the custody issues.

**B. THE COURT ABUSED ITS DISCRETION
IN FAILING TO GIVE THE OHIO COURT
ORDER FULL FAITH AND CREDIT.**

This case involves conflicting state court orders regarding the exercise of jurisdiction over the issue of child custody. Under Article IV, Section 1 of the United States Constitution, full faith and credit shall be given in each state to the judicial proceedings of every other state. Evans Geophysical, Inc. v. Ramsey Associated Petro, Inc., 217 W.Va. 45, 614 S.E. 2d 692 (2005). Under Article IV, Section 1, a judgment or decree of a court of record of another state will be given full faith and credit in the West Virginia courts unless it is clearly shown that the court of the other state is without jurisdiction to render the judgment or decree or it is procured through fraud. Syl. 1, Johnson v. Huntington Moving and Storage, Inc., 160 W.Va. 796, 239 S.E.2d 128 (1927); State ex rel Bubrycki v. Hall, 202 W.Va. 335, 504 S.E. 2d 162 (1998). It is the law of the other state, however, that is applicable to the jurisdictional determination. Estate of Cook v. Cook, 199 W.Va. 309, 484 S.E. 2d 192 (1997). The Ohio Court had jurisdiction to determine whether to exercise its general subject-matter jurisdiction over the child custody issue.

Ohio law provides that subject-matter jurisdiction is a court's authority to hear and decide a matter on its merits. State ex rel. Tubbs Jones v. Suster, 84 Ohio St.3d 70, 75 (1998). It

focuses on a court as a forum and whether an action falls under the class of cases that a court has the authority to decide. In the Matter of the Bureau of Support v. Brown, unreported, case number 00AP0742 (Carroll County Ct. of App., Ohio, November 6, 2001), P 6.

Ohio Revised Code Section 2301.03 (L) (1) provides the Ohio Court with all powers relating to divorce proceedings. Section 3109.04 grants the Ohio Court with general subject-matter jurisdiction over the allocation of parental rights and responsibilities in divorce proceedings. Therefore, the Ohio Domestic Relations Court had the statutory authority to render decisions regarding parental rights and responsibilities of the Rosen's children.

Furthermore, there has not been an allegation that the Ohio court order accepting jurisdiction was obtained by fraud. The parties were both represented by counsel and had the opportunity to submit documentary evidence for consideration by the court prior to issuance of the judgment accepting jurisdiction. Consequently, the Ohio court's decision to accept jurisdiction over the Rosen's children should have been given full faith and credit by the West Virginia court. Instead, the Family Court of Monongalia County issued the order that is the subject of this appeal. The order is in direct conflict with the decision of the Ohio Court which was rendered before the decision of the West Virginia Court.

Separate from general subject-matter jurisdiction, the concept of "jurisdiction" includes a court's exercise of jurisdiction in a particular case. Pratts v. Hurley, 102 Ohio St.3d 81, 83 (2004). The exercise of jurisdiction involves a court's authority to determine whether a specific case falls within the class of cases within its general subject-matter jurisdiction. In Re Matter of Bureau of Support v. Brown, supra, p. 7. The decision to exercise jurisdiction in a particular case does not constitute a lack of subject-matter jurisdiction.

Appellant filed a Complaint for Legal Separation, Spousal Support, Child Support, Attorney's Fees, Allocation of Parental Rights and Responsibilities, Restraining Orders and further legal and equitable relief in Ohio on April 6, 2006.⁴ Appellee was served the Summons and Complaint on the same day. Appellee did not file his divorce complaint in Monongalia County, West Virginia, until April 27, 2006.

By Order dated June 6, 2006, Ohio took jurisdiction of the case and found that the UCCJEA was not applicable in this case as the Appellee had waived it when he acquiesced and assisted Appellant and his children in their move to Ohio. West Virginia did not enter a contrary Order until August 9, 2006. It is the finding in the Order of the Ohio Court dated June 6, 2006 that must be given full faith and credit by the West Virginia Court.

Moreover, unlike the lack of general subject-matter jurisdiction, a judgment rendered under an alleged improper exercise of jurisdiction is not void and can only be attacked through a direct appeal. In the Matter of Bureau of Support v. Brown, supra, p. 7. Therefore, Appellee's only remedy to attack the Ohio Court Judgment is by a direct appeal through the Ohio Appellate Courts. Appellee's attempt to obtain orders from the West Virginia Court after Ohio has already accepted jurisdiction has resulted in the untenable situation of two (2) courts attempting to adjudicate parental rights for the Rosen's children. Clearly, this situation is what the full faith and credit clause of the Constitution is supposed to prevent.

⁴ The Court had subject matter jurisdiction for this Complaint and acquired personal jurisdiction over the Appellee on the same day the Complaint was filed. Appellant was a resident of the State of Ohio. Two boxes were checked on the Summons that was filed with the Complaint. One box stated that she was a resident of Cuyahoga County for 90+ days, and the second box stated that she was a resident of the State of Ohio 6+ months. The second box was inadvertently marked as she had not been a resident for six (6) months at the time she filed the Complaint. The Court had subject jurisdiction of the matters contained in her original Complaint as long as she was a resident of the State of Ohio for ninety (90) days which she was. After she met the residency requirements of six (6) months in Ohio, she modified the Complaint from a legal separation to a divorce on June 12, 2006.

C. THE COURT ABUSED ITS DISCRETION IN FAILING TO FIND THAT OHIO WAS THE MOST CONVENIENT FORUM UNDER THE UCCJEA

Under the UCCJEA, Ohio can obtain jurisdiction if West Virginia determines that Ohio is a more convenient forum under the factors contained in West Virginia Code, 48-20-207. In determining whether a West Virginia court is an inconvenient forum under the UCCJEA, the Court must consider if there is substantial evidence in Ohio concerning the children's care, protection, training and personal relationships. See W.Va. Code Section 48-20-201 (2) (B). The UCCJEA is premised on the theory that the best interest of a child is served by limiting jurisdiction to modify a child custody decree to the court which has the maximum amount of evidence regarding the child's present and future welfare. State ex rel. Conforti vs. Wilson, 203 W.Va. 21, 506 S.E.2d 58 (1998); See Syllabus 1, Interest of Brandon L. E., 183 W.Va. 113, 394 S.E.2d 515 (1990). The inconvenient forum test is also applicable to an initial child custody determination.

Under the facts of this case and the factors set out in 48-20-207, the Family Law Court of Monongalia County should have declared that it was an inconvenient forum to hear this case and agreed to the transfer of all issues in this case to the Court of Common Pleas, Domestic Relations Division, Cuyahoga County, Ohio. The factors contained in section 207(b) concerning inconvenient forum are as follows:

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;

No domestic violence involved in either state.

2. The length of time the child has resided outside this state;

The twins have resided in Ohio since December 1, 2005, and will continue to do so in the future. As time continues, more evidence will develop concerning their school, medical care, friends, relationships and their desire to remain with their mother and attend school there.

3. The distance between the court in this state and the court in the state that would assume jurisdiction;

It is only 3½ hours from Morgantown, West Virginia to Cleveland, Ohio. It would be less inconvenient for Appellee to travel to Ohio for hearings than it would be for Appellant, with her professional and child care responsibilities, to travel to West Virginia.

4. The relative financial circumstances of the parties;

Both parties receive substantial salaries so the cost to travel would not be a factor in making a decision concerning the most convenient forum.

5. Any agreement of the parties as to which state should assume jurisdiction;

None.

6. The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

If the twins were to appear in court involving custody and a parenting plan, it would be more convenient for them to testify locally where they currently reside. Also, any third party witnesses involving the children would be located in the Cleveland, Ohio, area as well as the guardian ad litem appointed on their behalf.⁵

7. The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence;

⁵ Pamela Gorski has been appointed guardian ad litem for the three (3) girls in Ohio, and Teresa Lyons has been appointed guardian ad litem for the three (3) girls in West Virginia. The Ohio guardian ad litem has been able to more readily obtain information about the children. However, both guardians ad litem have interviewed all three (3) girls.

Both proceedings have already been filed. The court in Ohio was moving more quickly than the West Virginia court until Appellee filed a Writ of Prohibition in the Appellate Court in Ohio. Neither Court is proceeding to a final resolution until there is a ruling on the Writ of Prohibition in Ohio and a decision by this Court in West Virginia.

8. The familiarity of the court of each state with the facts and issues in the pending litigation.

The Family Court Judge in Ohio is more familiar with the facts and issues in the case. The Temporary Order involving child custody and freezing assets was entered on April 6, 2006, and the Order Taking Jurisdiction was entered on June 6, 2006. There were two Orders entered by the Ohio Court on October 31, 2006. The first Order designated Appellant as the temporary residential parent of the minor children and also established a temporary visitation scheduled through June, 2007. The second Order appointed a Guardian Ad Litem for the three infant children. Also, a Pre-trial Motion hearing was held before the Magistrate in the Domestic Relations Court in Ohio on December 1, 2006. Another Order dated May 9, 2007, established a temporary visitation schedule through the end of 2007. Discovery has been filed in Ohio, and the Court is proceeding with the issues other than child custody. The Family Law Judge of Monongalia County held a hearing on May 26, 2006, involving jurisdiction and entered an Order Taking Jurisdiction of the Custody Matters Only (leaving all other issues with the Ohio Court) on August 9, 2006. A second hearing was held on December 6, 2006, involving competing Parenting Plans submitted by Appellee and Appellant but no Order was entered from that hearing. Additional hearings were held on March 5, 2007, and April 20, 2007, which established a new temporary parenting plan effective July 1, 2007. That Order was stayed pending this appeal.

Only Ohio has taken jurisdiction of the issues involving grounds for divorce, equitable distribution of marital assets, spousal support and other issues not related to a parenting plan, child custody and child support. There is personal service upon the defendants in both jurisdictions, and both Courts have subject matter jurisdiction. However, it would be more convenient and less expensive for both parties if one court would take jurisdiction of all issues

rather than splitting the issues between the two (2) forums; therefore, Ohio should take jurisdiction of all issues in this case.

West Virginia recognizes under the UCCJEA that a state which has a "significant connection" to the child or has "substantial evidence" with regard to the child's present or future care, protection, training and personal relationships can assume jurisdiction without specifically addressing whether that state qualifies as a home state. Sandra M. vs. Jeremy M., 197 W. Va. 542, 476 S.E.2d 213 (1996). In other words, a state that has "significant connection" and "substantial evidence" regarding the children can be given jurisdiction even though it does not qualify as a home state at the commencement of the proceedings.

In Interest of Branden L.E., supra at page 118, the court discussed the six (6) month requirement under the UCCJEA as follows:

The Act is premised on an assumption that significant data regarding a child can be generated following a six-month period at a new residence. See Moran, supra, 84 W.Va.L.Rev. at 149. In selecting the six month period as the amount of time necessary to establish a state as the home state of the child, the UCCJA drafters relied upon a study which demonstrated that a child is typically integrated into a new community within a six-month period.

The twins and Appellant have been fully integrated into the Ohio community for eighteen (18) months and have met the "significant connection test." Abigail attends private school in Connecticut and was attending school there when the family relocated to Ohio. She has little connection with either state. Appellant is not forum shopping. She filed suit in Ohio because this is where she lives and works and where her twins live. Ohio is the state with the maximum amount of evidence regarding the present and future welfare of the twins. Appellant has obtained a prestigious full-time position with Case Western Reserve University, and the twins have been attending school in Ohio and participating in extracurricular activities in Ohio.

Appellee was to relocate to Ohio. All evidence indicates that the parties both intended their future to be in Ohio. Moreover, the longer a child remains in the relocated state, the less likely that the former state would be the favored state for determining child custody. See Miller vs. Henry, unreported, case number 02 AP-673 (Franklin County, Ohio, Mar. 27, 2003), p.3. Under the “significant connection” test, Ohio has jurisdiction to hear and determine the custody issue of the girls as the evidence regarding the children’s present and future care is located in Ohio, not West Virginia.

In addition, the UCCJEA does not confer subject-matter jurisdiction. Rather, it constitutes restraints on a court’s exercise of its subject-matter jurisdiction already possessed by a court. See In the Matter of Joshua Ghader, unreported, case number 94 – CA – 15 (Hocking County, Ohio, 1995), p. 5, interpreting the UCCJA. See also In Re S.L.M., unreported, case number M 2005-02423-COA-R9-JV (Tenn. Ct. of App. Apr. 25, 2006), p.11, holding that the UCCJEA is a tool available to courts that are authorized under state law to establish, enforce or modify child support. In the present case, the Ohio Court already possessed subject-matter jurisdiction. Therefore, the Family Court misinterpreted the UCCJEA and exercised subject-matter jurisdiction over the same issue being litigated in the Ohio Court.

Moreover, a waiver of rights will be recognized unless it violates public policy. See Kelm v. Kelm, 92 Ohio St. 3d 223, 226 (2001). The finding that the UCCJEA requirements are subject to waiver is consistent with the statute’s purposes. The UCCJA (the predecessor statute to the UCCJEA) was a legislative response to the vexing problem of “interstate child snatching” by parents who sought a favorable custody award in a forum of their choice, thus leading to “jurisdictional deadlocks” among the states and a national epidemic of parental kidnappings. See Rodriguez v. Fietze, unreported, case number 04 CA 14 (Athens County, Ohio, Dec. 17, 2004),

p.9. See also In Re Sklenchar, unreported, case number 04 MA 55 (Mahoning County, Ohio, Aug. 18, 2004), P 9. The present case does not involve child snatching or a parent's relocation merely to find a more favorable forum. The Appellee waived his rights under the UCCJEA by agreeing with, assisting with, and participating in the decision to relocate with the twins to Ohio. Since the UCCJEA does not confer subject-matter jurisdiction, its provisions can be waived by a party.

**D. THE COURT ABUSED ITS DISCRETION
BY FAILING TO REQUIRE THE FAMILY
COURT TO HAVE DIRECT COMMUNICATION
WITH THE OHIO COURT BEFORE
TAKING JURISDICTION OF THE CASE.**

The Ohio Court's Order of June 6, 2006, taking jurisdiction found that the UCCJEA was not applicable because the Appellee had waived his rights under that statute. If this finding is subject to full faith and credit by the West Virginia Court, then the issue involving communication between the Courts is not necessary for the decision in this case. Also, if the Court finds that the Family Court abused its discretion by not finding that Ohio was the more convenient forum and met the significant connection test, this issue is also irrelevant.

Both West Virginia and Ohio have adopted the UCCJEA. Judge Culpepper, the Family Law Judge of Monongalia County, West Virginia, and Judge Celebrezze, the Judge of the Domestic Relations Court of Cuyahoga County, Ohio, did not follow West Virginia Code, 48-20-110, Communication Between Courts.

West Virginia Code, 48-20-110, reads as follows:

- (a) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter.
- (b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity

to present facts and legal arguments before a decision on jurisdiction is made.

(c) Communication between courts on schedules, 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 subsection (c) of this section, a record must be made of a communication under this section. The parties must 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.

In the decision by the Family Law Judge of Monongalia County, West Virginia, he admits that there was no direct communication between the two (2) Courts. Part of his decision reads as follows: "Both the Court in Ohio and the Court in West Virginia have made repeated efforts to communicate with one another in this matter and have exchanged documents and notes regarding the same, but due to the case loads and dockets of the respective courts have been unable to engage in direct verbal communications. Under the scenario here, such direct communication is not required under UCCJEA"⁶ It was error for the Courts not to have had direct communication.

In Loper v. Loper, 126 Ariz 14, 612 P.2d 65 (1980), the father filed for legal separation and child custody in Arizona after the mother had already sought divorce and child custody in Alaska. The Court held that the Arizona court committed error under the UCCJA⁷ when it found Alaska was an inconvenient forum without consulting and cooperating with the Alaska court. In discussing its decision, the court held that the purpose of the Uniform Act was to promote cooperation with courts in sister states when proceedings have been brought in two (2) states and to eliminate forum shopping. The Act contains extensive provisions for interstate cooperation in

⁶ There is nothing in the record to show what documents or notes were exchanged between the Courts.

⁷ Predecessor to the UCCJEA. The issue involving communication between courts is the same under both Acts.

the form of transmission of information from one state to another and failure to so communicate was reversible error. The court quoted extensively from the Commissioner's notes of the Uniform Act pertaining to cooperation and exchanging information between the courts that are to have competing jurisdiction for child custody issues. Part of the Commissioner's note to the Uniform Act, Section 6, states as follows:

Because of the havoc wreaked by simultaneous and competitive jurisdiction which has been described in the Prefatory Note, this section seeks to avoid jurisdictional conflict with all feasible means, including novel methods. Courts are expected to take an active part under this section in seeking out information about custody proceedings concerning the same child pending in other states.

Likewise the Commissioner's note to the Uniform Act, Section 7, states as follows:

Like section 6, this section stresses interstate judicial communication and cooperation. When there is doubt as to which is the more appropriate forum, the question may be resolved by consultation and cooperation among the courts involved. 9 Uniform Laws annot. at 139.

In Hickey vs. Baxter, 461 So.2d 1364 (Fla. 1984), there was competing jurisdiction for the child custody between Florida and Virginia. The Florida court held that when simultaneous child custody proceedings were pending in different states, communication between courts involved is essential in making a determination as to which is the more appropriate forum to hear the custody dispute, and it was reversible error for the Florida court to fail to communicate with the Virginia court.

Strong policy against simultaneously custody proceedings in different states is implemented by specific directions contained in the UCCJA which require active communication between separate courts before exercising jurisdiction to decide interstate custody dispute. Zimmerman v. Newton, 569 N.W.2d 700 (N.D. 1997). The North Dakota court, citing

Zimmerman, expected courts to communicate with courts from other states to identify the more appropriate forum because communication may prevent contradictory awards. Harshbarger v. Harshbarger, 724 NW 2d 148, (ND 2006). The Harshbarger court found that contradictory awards from sister states were the antithesis of what the UCCJEA was designed to accomplish.

Under the UCCJA, state courts exercising simultaneous jurisdiction have a duty to communicate and cooperate in order to determine which forum is most appropriate for the best interest of the children. Nazar v. Nazar, 505 N.W.2d 628 (Minn. App. 1993). It was incumbent upon the Arkansas court, before proceeding to final decree in child custody proceeding, to enter into direct communication with one or both district courts in Texas, in which divorce and custody suits, respectively, had been filed, to determine, in accordance with UCCJA, which was the better forum to decide custody. Norsworthy v. Norsworthy, 713 S.W.2d 451 (Ark. 1986).

Ohio has dealt with the issue of communication between competing courts. In situations where pleadings have been filed in different states within days of each other, the provisions of the UCCJA precluding a state from accepting jurisdiction when custody proceedings have been instituted in another state should be construed liberally and consistently with the key being "good communication" between the sister state courts. Mayor v. Mayor, 595 N.E.2d 436 (Ohio App. 1991).

In re Absher Children, 141 Ohio App.3d. 118, 126 (2001), 750 N.E.2d 188, the court quoted extensively from In re Adoption of Asente, 90 Ohio St.3d 91, 734 N.E.2d 1224 (2000):

"Appropriately, the primary 'purpose of the UCCJA is to avoid jurisdictional competition and conflict with other jurisdictions and to facilitate the speedy and efficacious resolution of custody matters so that the child or children in question will not be caught in a judicial "tug of war" between different jurisdictions.' (Citations omitted.)

“When a court of this state is asked to make a custody decision with respect to a child who is the subject of proceedings within the jurisdiction of another state, the UCCJA anticipates that a *meaningful dialogue* will occur between the judges in deciding which court is the more appropriate forum from which to decide the child custody issues. R.C. 3109.24.” (Emphasis added.) *id.* at 102, 734 N.E.2d at 1233.

In some of the cases previously cited, it cannot be determined whether the statute involving communication uses the word “shall” or “may”. In the case of In Re Interest of L.C., 18 Kan. App.2d 627, 857 P.2d 1375 (1993), the Kansas statute provided that when there were competing jurisdictions involving custody of the child that the court “may” communicate with the court of another state and exchange information pertinent to the assumption of jurisdiction by either court. The Court held that although the UCCJA states that the trial court may communicate with the court of another jurisdiction to achieve the purposes of the Act, the procedures are more than mere suggestions, and that it was an abuse of discretion for the Kansas court to fail to communicate with the court of Pennsylvania to aid the resolution of these matters. Even though the word “may” was used in the statute, it was mandatory to have meaningful communication between the two courts before one court took jurisdiction of the custody issues.

Similarly, in Hamilton v. Washington, 2005 WL 1654017 (Ky. 2005), the Kentucky statute provides that courts, before determining whether to decline or retain jurisdiction, “may” communicate with the court of another state. However, in Hamilton, the court required communication with the court of the other state when the Kentucky court was informed that a proceeding was commenced in another state after Kentucky has assumed jurisdiction. The court found that the family court failed to perform its duties when it failed to conduct an inquiry into the proceedings in Pennsylvania. Once again, even though the statute uses the word may,

Kentucky courts are required to conduct an inquiry regarding the proceedings in the sister state's court.

In West Virginia Department of Health and Human Resources ex rel. Sharron Hisman v. Angela D., et al, 203 W.Va. 335, 507 S.E.2d 698 (1998), the competing jurisdictions in an abuse and neglect case were West Virginia and Ohio. The former boyfriend of the maternal grandmother in Ohio sought custody as well as adoption of said child in Ohio. The abuse and neglect proceedings were occurring against the child's mother in West Virginia. In dealing with the lack of communication between the competing courts, the court made the following statement at page 344:

While a matter arising in the abuse and neglect arena obviously entails issues differing from a standard custody proceeding, the practice encouraged in the UCCJA regarding courts of the two states conferring and agreeing upon the appropriate forum for jurisdiction would still be prudent. If, for instance, a prior custody proceeding was made (or pending) in one state in accordance with the UCCJA jurisdictional prerequisites and subsequent abuse and neglect occurred in a second state, the evidence surrounding the abuse allegation would exist in that second state. In such instance, the better practice would be for the judges to confer and agree which court should hear the abuse and neglect matter.

The Court went even further concerning mandatory communication when it cited footnote 18 of Haller v. Haller, 198 W.Va. 487, 481 S.E.2D 793 (1996):

The UCCJA encourages discussion and collaboration between the judge in the courts which could potentially assume jurisdiction over the matter, as evidenced by its provisions regarding inconvenient forums and simultaneous proceedings in other states. West Virginia Code § 48-10-7(d) provides that a court, prior to

determining whether to retain jurisdiction “may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.” West Virginia Code § 48-10-6(c) specifies that if a court discovers, during the pendency of its own proceeding, the antecedent existence of a proceeding concerning custody in another state, “it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections nineteen, twenty, twenty-one and twenty-two [§§ 48-10-19, 48-10-20, 48-10-21 and 48-10-22] of this article.”⁸

West Virginia has recognized that a judge has a mandatory duty to engage in meaningful communication with the judge of a competing state involving simultaneous custody issues. Judge Cookman was lauded for his exemplary understanding of how the UCCJA drafters intended courts to interact with each other in the face of multiple proceedings involving the same issues when he instigated a telephone conference with the Maryland judge in the midst of a court proceeding in order to avoid jurisdictional competition and conflict. Rock v. Rock, 197 W.Va. 448, 475 S.E.2d 540 (1996). Likewise, in Haller v. Haller, *supra*, the judge conferred with the Louisiana court to determine whether the custody proceedings should proceed in West Virginia when there was currently pending an action in Louisiana for child support only.

In many of the cases previously cited, the UCCJA applied. The UCCJA was designed to: (1) avoid jurisdictional competition and conflict in child custody matters; (2) promote cooperation between courts of different states so that a custody decree is rendered in the state

⁸ Decided under the UCCJA, predecessor to the UCCJEA. West Virginia Code §48-10-7 (d) is similar to the present West Virginia Code §48-20-207; West Virginia Code §48-10-6 is similar to the present West Virginia Code §48-20-206.

which can best decide the case in the interest of the child; (3) discourage the use of the interstate system continuing controversies over child custody; (4) deter child abductions; (5) avoid relitigation of custody decisions of other states; and (6) facilitate the enforcement of custody of decrees from other states. Saavedra v. Schmidt, 96 SW 3d 533 (Tex. 2002). The Texas court pointed out that the UCCJEA is the successor statute to the UCCJA and shares its goal of resolving custody disputes between geographically separated parents on the assumption that sister states will communicate with one another. Phillips v. Beaber, 995 SW 2d 655 (Tex. 1999); In re McCoy, 52 SW 3d 297 (Tex. 2001). Texas, much like several other states, interprets the UCCJEA to require communication between courts when simultaneous proceedings are pending. Filsinger v. Filsinger, 2005 WL 1992422 (Tex. 2005). Even though most states have now adopted the UCCJEA, the issue involving communication between the competing courts remains the same as it was under the UCCJA.

The UCCJEA was adopted to avoid the very situation that is occurring here. Jurisdictional competition exists because both Ohio and West Virginia are proceeding to hear the custody issue of the three (3) children. The child custody suit was filed in Ohio approximately a month before the suit was filed in West Virginia. The Ohio court took jurisdiction of the custody issues nearly two (2) months before the West Virginia court entered an Order taking jurisdiction. There has been no meaningful communication or cooperation between the courts. It is imperative in cases such as these that the courts have meaningful dialogue to assist them in determining which is the more convenient forum to hear this issue. If there had been meaningful communication and a record made, one court would probably have taken jurisdiction, and we would have avoided this situation in which the children and their parents are caught in conflicting custody orders which only adds to the plight of these three (3) children who are

caught in this "tug of war" between their parents. It was erroneous for Judge Culpepper not to have meaningful conversations and communication with Judge Celebrezze in Ohio concerning which is the more convenient forum to hear the custody issue involving these three (3) children. This Court should reverse and remand with directions concerning mandating meaningful communication between the two courts before jurisdiction is established.

E. CONCLUSION

The Circuit Court of Monongalia County abused its discretion in failing to give the Ohio Court Order full faith and credit, in failing to follow the UCCJEA with regard to the most convenient forum, and in failing to require the Family Court to have direct and meaningful communication with the Ohio Court before taking jurisdiction. As a result, both West Virginia and Ohio are proceeding to hear the custody issue of the three (3) children.

VI. RELIEF PRAYED FOR

Appellant respectfully requests that this Honorable Court reverse the decision of the Family Law Court of Monongalia County, West Virginia, and hold that the Family Court should have given full faith and credit to the Ohio Court's Order of June 6, 2006, or hold that the Order of the Family Court of Monongalia County taking jurisdiction of the child custody issue is an abuse of discretion because the Ohio Court is a more convenient forum to hear the child custody issue as Ohio has met the "significant connection" test in that it has maximum access to relevant evidence regarding the children's present and future care, protection, training and personal relationships. In the alternative, Appellant respectfully requests that this Honorable Court remand this case to the Family Court of Monongalia County with directions that the Court have

meaningful and direct communication with the Ohio Court to determine which Court should take jurisdiction of the child custody case.

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