

BEFORE THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

IN RE THE MARRIAGE OF:

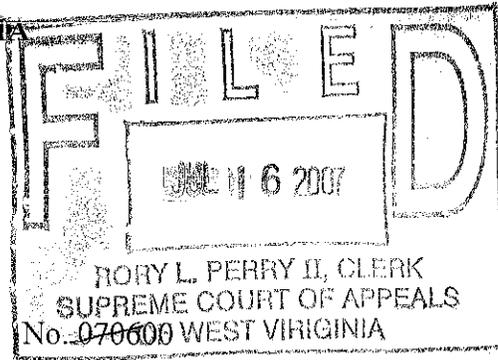
KATHLEEN R. ROSEN,

Appellant,

vs.

DAVID A. ROSEN,

Appellee.



33437

BRIEF OF APPELLEE, DAVID A. ROSEN

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I. HISTORY OF THE CASE

This is a divorce case arising in the Circuit Court of Monongalia County, West Virginia. On October 24, 2006, Judge Russell M. Clawges Jr., 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, on August 9, 2006. The Appellant appeals the Circuit Court's affirmation of the Family Court's ruling retaining jurisdiction over the issue of custody of the three (3) minor children of the parties, Abigail Rosen, Gillian Rosen and Rachel Rosen.

III. STATEMENT OF FACTS

David A. Rosen, ("Appellee") and Kathleen R. Rosen, ("Appellant") were married on December 1, 1979, in Arlington, Virginia. There were four (4) children born of the marriage, namely, Madeline Rosen, date of birth January 7, 1987, Abigail Rosen, date of birth May 27, 1991, and Gillian and Rachel Rosen, twins, who were born on February 8, 1994.

From May of 1992, until December 1, 2005, the parties and their children resided in Morgantown, West Virginia. Both parties came to Morgantown, West Virginia to further their careers and work in the highly specialized field of Pediatric Anesthesia. Despite having Post-Polio Syndrome, the Appellee has worked full time, without interruption, as a Pediatric Anesthesiologist at West Virginia University Hospitals where he has also served as a faculty member in the Departments of Anesthesia and Pediatrics since May of 1992. The Appellant chose not to return to the workforce immediately following the birth of the twins in February of 1994; however, the minor children were cared for by a full time nanny, who served as the primary

caretaker for the children during the entire time they resided in West Virginia. The Appellant finally returned to the workforce in 1997. The Appellee had a commitment to West Virginia University until September 29, 2007, as he is a sub-contractor on a grant for research conducted in connection with the National Institute of Health (NIH). This grant spans from September 30, 2004, through September 29, 2007, and has a possibility of extension. Although Appellee's medical condition could one day in the distant future incapacitate him, there have been no indications that this day is near and, accordingly, there has never been the need for Appellant to assume the role as the primary financial provider for the family.

Nevertheless, Appellant became disenchanted with her employment in West Virginia, at West Virginia University Hospitals, Inc., and began expressing resentment as she felt limited due to the fact that she was in a narrow and limited field and the position that she desired was already occupied by her husband, the Appellee. She, with the knowledge and support of her husband, began to pursue positions outside of West Virginia. However, Appellant led the Appellee to believe that she intended on continuing to live in West Virginia and commuting. There were no early discussions about uprooting the entire family and relocating outside of West Virginia.

The parties soon after began to experience serious marital problems resulting in their agreement to participate in marriage counseling in 2005. In the spring of 2005, the Appellant informed the Appellee that she intended on accepting a position with Mt. Sinai Skills and Simulation Center of the Case Western Reserve School of Medicine in Cleveland, Ohio. She alone began searching for housing in the Cleveland area. However, she did invite her husband to come to Cleveland for one (1) day and view homes after she had narrowed down her selection.¹ The Appellant, alone, entered into the purchase agreement for the home she selected in

¹ It is ironic that although the Appellant claims that she intended on assuming the role of primary financial provider for the family due to Appellee's "progressing Post-Polio Syndrome", and that her actions were in anticipation of his "advancing disease" none of the homes which she selected in Cleveland, Ohio were handicap friendly.

Cleveland, Ohio, and the home was not deeded in the parties' joint names, but solely in her name. Further, the Appellant never informed the Appellee of a closing date or invited him to participate in the closing. Rather, she brought a mortgage deed to him in West Virginia and instructed him that he needed to execute same to waive his dower interest in her Cleveland, Ohio residence.²

It was not until the fall of 2005 that Appellant informed Appellee that she intended on uprooting the twins, Gillian and Rachel, from their home and friends in West Virginia and taking them with her to Cleveland, Ohio. The Appellee pleaded with Appellant to allow the twins to remain with him in their home in West Virginia, but due to Appellant's threats to divorce Appellee if he did not allow her to take the twins to Ohio with her, the Appellee, after consulting with a lawyer³, in an attempt to save what might be left of his marriage and family, acquiesced, on the condition that the twins be enrolled in a private, rather than public, school in Cleveland, Ohio.

On December 1, 2005, Appellant, with the twins, left for Cuyahoga County, Ohio. The Appellee assisted his wife and the twins with the physical move. Contrary to the assertions of Appellant that the Appellee returned to West Virginia to transition his hospital staff and sell the parties' West Virginia home, it was clear to both the parties that their marriage may not survive the parties' separation and that Appellee, who was required to remain in West Virginia, at least another two (2) years to fulfill his grant, may not join Appellant in relocating to Ohio. The West Virginia home has never been listed with a realtor and has not been on the market. The parties' remaining minor daughter, Abigail, has been enrolled in boarding school in Connecticut since

² An examination of the mortgage, which was identified as Exhibit 1 and attached to the Appellant's Memorandum of Law in support of her appeal to the Circuit Court, evidences that the Appellee's signature was notarized in West Virginia. R-389.

³ David Rosen had consulted a Morgantown attorney, William Frame, who advised him that the twins' residence would remain in West Virginia for a period of six (6) months following their departure to Ohio.

the fall of 2004, and has never relocated to or resided in Ohio. She has maintained her residence in West Virginia, since her mother's relocation to Ohio on December 1, 2005, returning to West Virginia for her breaks from school and for medical and psychological appointments with her primary care physicians and therapist in Morgantown, West Virginia. (See copy of affidavit of nanny, Shawna Dulin and correspondence from Pomfret School, attached as Exhibits 4 and 5 to Appellee's Memorandum of Law In Opposition To Motion To Dismiss and Transfer Case to Cuyohoga County, Ohio, Court Record, Page 198).

The Appellee did travel as often as his work schedule and driving limitations due to his Post-Polio Syndrome would allow, to Cleveland, Ohio to visit with the twins and attempt efforts at reconciliation with the Appellant. It was during one of these visits, on April 6, 2006, while he was playing ball with his children in the Appellant's driveway, that he was served with an action instituted by Appellant, seeking a Legal Separation, Spousal Support, Child Support, Attorney Fees, Allocation of Parental Rights and Responsibilities, Restraining Orders, and Further Legal and Equitable Relief, filed in the Court of Common Pleas, Division of Domestic Relations, Cuyahoga County, Ohio and an Ex Parte Order relating to custody of the three (3) minor children, copies of which are attached as Exhibit B to Appellee's Petition for Divorce which begins on Page 3 of the Court Record.

On April 27, 2006, the Appellee filed a Petition for Divorce and Motion For Expedited Hearing on the Issue of Custody in the Family Court of Monongalia County, West Virginia, which was personally served on the Appellant on April 30, 2006. Based on the issues specifically raised in the West Virginia pleadings, on May 6, 2006, the Family Court of

Monongalia County entered an Order setting a hearing for May 26, 2006, based on the provisions of West Virginia Code § 48-20-107.⁴

On May 12, 2006, the Appellee filed a Motion To Dismiss in the Ohio Court. On May 16, 2006, the Appellant filed a Motion To Exercise Jurisdiction Over the Child Custody Issues in Cuyahoga County, Ohio Domestic Relations Court.

On May 22, 2006, the Appellant filed a Motion to Dismiss in the West Virginia Court. On May 26, 2006, the Family Court of Monongalia County, West Virginia, held a hearing in this case during which the parties, by and through their respective counsel argued the issue of jurisdiction. The court took the matter under advisement, in order to communicate with the Ohio court.

By Order dated June 6, 2006, despite express knowledge of the proceedings pending in the State of West Virginia, the Domestic Relations Court of Cuyahoga County, Ohio entered an Order taking jurisdiction with regard to the custody of all three (3) minor children, finding that Ohio was a more convenient forum to hear the issue involving custody of the minor children. Further, despite the fact that subject matter jurisdiction under the UCCJEA cannot be waived by a party, the Ohio court found that the Appellee had waived his rights under the UCCJEA by "agreeing to the relocation of Kathleen Rosen and the minor children to the state of Ohio."

On August 9, 2006, the Family Court of Monongalia County, West Virginia, entered Order Retaining Jurisdiction Over Child Custody of the three (3) minor children of the parties, which included the following findings:

1. Both parties resided together with their children in Monongalia County, West Virginia from 1992 until December 1, 2005; and

⁴ Pursuant to West Virginia Code § 48-20-107, if a question of existence or exercise of jurisdiction under the UCCJEA is raised in a child custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously.

2. Because both divorce actions were filed in April of 2006, West Virginia is the only home state under the UCCJEA; and
3. Before Ohio may exercise jurisdiction over the custody of the children in this case, West Virginia must first decline jurisdiction after making a determination that West Virginia is an inconvenient forum; and
4. Information, and the witnesses thereto, reside almost exclusively in Monongalia County, West Virginia, in reference to the care-taking responsibilities preformed by the respective parties prior to their separation; and
5. As the oldest minor child of the parties, Abigail, has never lived in Ohio, there would be no means by which Ohio could exercise jurisdiction over her custody; and
6. The West Virginia court is a more appropriate forum to decide custody in this case.

The West Virginia Family Court Judge made the Order Retaining Child Custody Jurisdiction entered on August 9, 2006, a final and appealable Order. On September 7, 2006, Kathleen Rosen appealed this Order to the Circuit Court of Monongalia County.

On October 24, 2006, after reviewing the parties' briefs and the entire record before the Family Court in this matter, the Circuit Court of Monongalia County entered its Order Denying the Petition for Appeal and affirming the Order of the Family Court. It is from this Order that Appellant has appealed.

VI. SUMMARY OF THE LAW AND ARGUMENT

A. STANDARD OF REVIEW

This Court has held that “in reviewing a final order of a circuit judge upon review of, or a refusal to review, a final order of a family court judge we review the findings of fact under a clearly erroneous standard and the application of the law to facts under an abuse of discretion standard. We review questions of law *de novo*. Syl. Carr v. Hancock, 216 W.Va. 274, 607 S.E.2d 803d (2004), Syl. Pt. 1, Staton v. Staton, 218 W. Va. 201, 624 S.E.2d 548 (2005). Additionally, “if the findings of fact and the inferences drawn by a family master are supported by substantial evidence, such finding and inference may not be overturned even if a circuit court may be inclined to make a different finding or draw contrary inferences” Syl 3. Stephen L.H. v. Sherry L.H., 195 W.Va. 384, 386, 465 S.E.2d 841 (1995).

B. SUMMARY OF THE ARGUMENT AND THE UCCJEA

This is an initial child custody case involving a conflict regarding West Virginia and /or Ohio’s jurisdiction to adjudicate the child custody proceeding for the three (3) minor daughters of the parties. As the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter referred to as “UCCJEA”),⁵ is the controlling statute in the present action a review and understanding of the development of the UCCJEA is required.

In July of 2000, West Virginia adopted the UCCJEA. This act replaced the Uniform Child Custody Jurisdiction Act (hereinafter referred to as “UCCJA”), which had governed jurisdiction over interstate child custody cases in West Virginia since 1981. One of the most significant changes to the old Act was the implementation of deference to home states in initial

⁵ West Virginia Code §48-20-101 *et seq.*

child custody determinations. The UCCJEA has specifically designated jurisdiction to a child's home state for a six month period in order to clear up any confusion as to where the proper forum is. The UCCJEA provides that the adopting state will limit its claims to child custody jurisdiction to only a subset of the children over whom jurisdiction might be claimed. *Uniform Child-Custody Jurisdiction and Enforcement Act*, 32 Fam. L.Q. 301, 339 (1998).

As aforementioned, the UCCJEA grants jurisdiction to hear child custody matters to the "home state" of the child. The term "home state" is identified as the state in which the 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 as long as one parent continues to reside within the home state. W.Va. Code §48-20-102(g).

It is important to note that this provision of the UCCJEA is more expansive than the former provisions of the UCCJA as under the UCCJA home state jurisdiction was only extended if the child was "absent from this State because of his removal or retention by a person claiming his custody or for other reasons." (former W.Va. Code §48-10-3(a)(1)).

Therefore, under the UCCJEA, the state where the child lived will continue to have jurisdiction for six (6) months if a parent remains in the "home state". Thus, as in the case at bar, where West Virginia was the home state of the three Rosen minor children, and two of the minor children are removed from West Virginia by one parent to the State of Ohio, as was done by Kathleen Rosen, but the other parent remains in West Virginia, as David Rosen has, then West Virginia's home state jurisdiction extends for six (6) additional months **and trumps all other claims for jurisdiction** except those based on abandonment or emergency which this case is not. Therefore, West Virginia is the appropriate forum to hear all matters regarding the custody of the minor Rosen children.

V. ARGUMENT

A. **THE OHIO ORDER SHOULD NOT BE GIVEN FULL FAITH AND CREDIT BECAUSE IT WAS RENDERED WITHOUT JURISDICTION AND OBTAINED FRAUDULANTLY**

Under the full faith and credit clause of the United States Constitution, a judgment obtained in a sister state is to be recognized as binding in West Virginia courts unless it can be shown that the foreign court lacked jurisdiction to render the judgment or that it was procured through fraud. U.S. Const. Art. 4 § 1. In the instant case, West Virginia should not give full faith and credit to the Ohio judgment regarding the custody of the three minor daughters of the parties, as Ohio clearly lacks jurisdiction under the express terms of the controlling statute, the UCCJEA, and, in addition, the Ohio judgment was obtained by the Appellant through fraud.

Because both states in conflict in this matter, Ohio and West Virginia, have adopted the UCCJEA, it should be the only statute and law applied to the jurisdictional determination of the child custody case at bar. The purpose of the enactment and adoption of the UCCJEA was to avoid this very situation, competing jurisdictional claims in custody matters, by providing specific guidelines for courts to follow in initial child custody determinations. In determining the proper jurisdiction for an initial child custody determination, both courts must adhere to the prerequisites of the UCCJEA as follows:

(a) **a court of this state has jurisdiction to make an initial child custody determination only if:**

- (1) **This is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent**

from this state but a parent or person acting as a parent continues to live in this state;

- (2) A court of another state does not have jurisdiction under subdivision (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this is the more appropriate forum under section 20-207 or 20-208 (§ 48-20-207 or § 48-20-208), and;
 - (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; and
 - (B) Substantial evidence is available in this state concerning the child's care, protection, training and personal relationships;
- (3) All court's having jurisdiction under subdivision (1) or (2) of this subsection 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 20-207 or 20-208 (§ 48-20-207 or § 48-20-208);
or
- (4) No other court of any other state would have jurisdiction under the criteria specified in section (1), (2) or (3) of this subsection.

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

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

W. Va. Code § 48-20-201 (2001) ⁶*emphasis added*

After examining the factors set forth in the UCCJEA for determining jurisdiction, the Family Court Judge for Monongalia County properly determined that West Virginia was clearly the home state of the three (3) minor children of the parties. The facts in the record demonstrated that West Virginia was the state where both parties resided together with their children from 1992 until December 1, 2005. The twins were removed from West Virginia on December 1, 2005, and both the Ohio and the West Virginia custody actions seeking initial custody determination were filed in April of 2006, less than six months following the departure of Appellant with the twins to the State of Ohio. Furthermore, David Rosen and the minor child, Abigail have never resided in the State of Ohio. Consequently, the Family Court Judge found that West Virginia, and not Ohio, was the state that satisfied the jurisdictional prerequisites of the UCCJEA as the home state and as such, elected to appropriately exercise its jurisdiction.

In addition, the UCCJEA mandates that if a person seeking to invoke a court's jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction. W. Va. Code §48-20-208. In the instant case the appellant initially misled the Ohio court by filing fraudulent pleadings and documents during the initial custody determination. In seeking an unnecessary ex parte order from the Court of Cuyahoga County, Ohio on April 6, 2006, Appellant intentionally misled the Ohio Court into believing that it had subject matter jurisdiction in this matter, by making a false assertion that she and the three minor children of the parties had resided in the state of Ohio for over six (6) months, when in actuality the Appellant and the twins had only resided in Ohio for four months and the minor child Abigail had never

⁶ See Ohio R. C. § 3127-15 (A).

resided in Ohio.⁷ As a result, the Ohio court was falsely led to believe that it has subject matter jurisdiction under the UCCJEA, when in fact it did not. Therefore, Ohio should be compelled to relinquish jurisdiction pursuant to the standards set forth in the UCCJEA because the jurisdiction was obtained by fraud.

B. THE LOWER COURT WAS CORRECT IN RULING THAT WEST VIRGINIA, NOT OHIO, WAS THE MOST CONVENIENT FORUM UNDER THE UCCJEA

Both W. Va. Code § 48-20-201(a)(2) and Ohio R.C. § 3127-15 (A) (2) prohibits a state other than the home state from exercising jurisdiction unless the home state of the child has declined to exercise jurisdiction on the ground that another state is the more appropriate forum. In determining the most convenient forum, courts must weigh several factors set forth in the UCCJEA. They 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;**

There is no domestic violence alleged or involved in either state in the instant matter.

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

On April 6, 2006, the time the Appellant filed her initial pleadings falsely alleging that she and all three children had resided in Ohio for over six months, she and the twins had only resided in Ohio since December 1, 2005, a period of only four months. The minor child Abigail did not and has not ever resided in Ohio. Prior to the Appellant moving with the twins on December 1, 2005, the

⁷ See initial filing of appellant in Ohio, a copy of which is attached hereto as Exhibit A, consisting of two (2) pages, wherein it is certified that Plaintiff in the action's length of residence in Ohio was six (6) months +.

parties along with the minor children had resided in the state of West Virginia for over twelve (12) years.

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

It is over 3 ½ hours from Morgantown, West Virginia to Cleveland, Ohio. The Appellant has previously acknowledged that the Appellee suffers from Post Polio Syndrome and is in a state of progressively deteriorating health. Due to this condition he wears leg braces. A 3 ½ hour drive from Morgantown to Cleveland has proved to be and will continue to be more difficult as the Appellee's Post Polio Syndrome progresses. The Appellant, on the other hand, is in perfect health and is able to travel without limitations. The Appellee continues in his well-established career as a pediatric anesthesiologist, to actively practice medicine in a highly specialized field with time restraints and demands. To travel from West Virginia to Ohio for these proceedings would be detrimental to not only his continued health and well-being, but also his work.

4. **The relative financial circumstances of the parties;**

Due to the fraudulent initial filings of the Appellant in Ohio there are Restraining Orders preventing the Appellee from accessing marital funds, his own separate funds, and additionally preventing him from refinancing the former marital home in West Virginia in which he currently resides. After paying his high mortgage and the boarding school costs for the minor child Abigail, the Appellee has little financial resources available for his own living expenses and

travel. The Appellant, on the other hand is not restrained from access to any of her funds or marital resources and has no financial restraints.

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

Neither party asserts that an agreement has been made as to jurisdiction.

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

There are more witnesses in West Virginia regarding the children as they have resided most of their lives in West Virginia. There are numerous amounts of third party witnesses who live in West Virginia. This includes not only the children's nanny for over eleven (11) years, their teachers, neighbors, friends, doctors, and coaches, but also their adult sister, Madeline, who, although attending college at Penn State, has chosen to continue her residence in West Virginia with her father. Additionally if the custody matter is heard in Ohio, the input of the twins as to where they want to reside, will not be considered by the court, as Ohio does not allow a child of 14 years or older to have input as to which parent they want to reside with. Whereas, under West Virginia law, The Court can allocate custodial responsibility to accommodate the firm and reasonable preference of a child who is fourteen years of age or older.

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

Both actions have already been filed. The Ohio court ignored the actions of the West Virginia Court and has entered numerous orders ex parte without the Appellee ever being notified of a court date or hearing in advance of same being

held. On the other hand, the West Virginia Court has strictly adhered to procedures and the provisions of the UCCJEA and has held numerous hearings with both parties and their counsel present with all orders resulting therefrom being provided directly to the Ohio court. In contrast, the Ohio court sacrificed proper procedure in exchange for expeditious adjudication failing to serve the best interest of anyone but the Appellant.

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

While the Family Court Judge in West Virginia has painstakingly ensured that proper procedure and an adequate record surrounds this case, the Ohio court has failed to properly or adequately gather relevant and correct factual information. The Ohio court initially acted and continues to act on a case involving custody that was fraudulently filed in its beginning stages in the Appellant's attempt to circumvent the proper jurisdiction of the West Virginia court. The June 6, 2006, Order from the Ohio Court titled Order Taking Jurisdiction was entered despite the Ohio Court's knowledge that an action was filed in West Virginia and that a hearing was held on May 26, 2006 by the West Virginia Court which provided substantial advance notice to all parties and their counsel so that they could be present. The Ohio court appears to have felt that it was some kind of a race for control rather than a judicial process to ensure that individual rights were protected. If this case was a race, Ohio surely has won. However, this case is not a race but an adjudication of custody based on strict statutes, procedure, and law, all of which have been ignored by the Ohio court.

Hearings held in Ohio have not been with proper notice and are usually in the form of attorney conferences with no advance notice to allow the Appellee to appear.

The only thing to be considered when determining the most convenient forum for adjudication in initial child custody jurisdiction determinations are the aforementioned factors. However, Appellant makes several arguments in addition to the convenient forum test.

First Appellant argues that although both courts have subject matter jurisdiction and personal service is available to both parties in both jurisdictions, Ohio has taken jurisdiction over the issues involving grounds for divorce, equitable distribution of marital assets, spousal support and other issues unrelated to the children. It is for this reason Appellant argues Ohio should take jurisdiction over everything, including child custody, to cut costs to both parties. These factors are not necessary to address when determining initial child custody under the UCCJEA, However it is important to note that Appellant has failed to mention that Appellee has filed similar motions and has been pursuing the same path in West Virginia as Appellant has been pursuing in Ohio. In fact, Appellant's initial filings did not seek a divorce, but only a separation, and she did not modify her pleadings to request a divorce until June 12, 2006. It was the Appellee who first filed for divorce in West Virginia on April 27, 2006. The marital home is in West Virginia; the home in Ohio is only in the Appellant's name. West Virginia has the exact same interests as Appellant argues that Ohio has, in fact more as the children have lived the majority of their lives in West Virginia, not Ohio. Since a substantial portion of the marriage lasted in West Virginia and the majority of the marital property was acquired therein, this forum is more appropriate.

Appellant's further reliance on the significant connection test is also inappropriate and unfounded. The cases on which the Appellant relies are cases that fell under the previous controlling statute, the Uniform Child Custody Jurisdiction Act, hereinafter referred to as the "UCCJA", not the replacement statute which currently governs this matter, the UCCJEA. Prior to the adoption of the UCCJEA the significant connection test was specifically drafted to guide courts when a child has been recently removed from his or her home state and the remaining spouse has also moved away. Under this test, the state with jurisdiction is the one that has maximum access to relevant evidence regarding the child's present or future care, protection, training, and personal relationships. McAtee v. McAtee, 174 W.Va. 129, 323 S.E.2d 211 (1984) citing to W. Va. Code 48-10-3(a)(2) [1981]. The UCCJEA suggests going to the significant connection test only if there is not a home state or the home state has declined to exercise jurisdiction. However, these are not the facts in the instant case. Under the UCCJEA, West Virginia is clearly the home state and West Virginia has clearly refused to relinquish jurisdiction. Accordingly, there is no need to apply the significant connection test because there *is* a home state, West Virginia.

Appellant further argues that the UCCJEA does not confer subject matter jurisdiction but restrains a court's exercise of subject matter jurisdiction already possessed by the court. This is correct. In the instant case, we are not arguing that the Ohio court does not have subject matter jurisdiction to hear custody cases in general, but that under the UCCJEA the Ohio court is restrained from exercising this jurisdiction because it is not the home state. The restraints imposed by the UCCJEA on the originally conferred scope of the Ohio Court's subject matter jurisdiction require the Ohio Court to decline exercising jurisdiction when another state is the home state of the child.

C. THE UCCJEA ENCOURAGES COMMUNICATION BETWEEN COURTS, IT DOES NOT REQUIRE IT. WEST VIRGINIA COURTS WENT ABOVE AND BEYOND THE EXPECTATIONS OF THE UCCJEA BY EXCHANGING WRITTEN DOCUMENTS WITH THE OHIO COURT AS WELL AS CONTINUOUSLY KEEPING THE OHIO COURT ABREAST OF THE ONGOING PROCEEDINGS IN WEST VIRGINIA.

The Appellant alleges that the communication between the Family Court Judge of Monongalia County, West Virginia, and the Judge of the Domestic Relations Court of Cuyahoga County, Ohio did not follow the provision of the UCCJEA requiring communication between courts. The crux of the Appellant's argument stems from an interpretation of the language found in West Virginia Code §48-20-110. The problem with Appellant's argument is that this statute does not require direct verbal communication. Rather, it states, "a court of this state **may** communicate with a court in another state concerning a proceeding under this chapter." (emphasis added). W.Va. Code §48-20-110. This court in addressing the interpretation of legislative language and intent has consistently stated "When the language chosen by the Legislature is plain, we apply, rather than construe, such legislative language. State ex rel. McGraw v. Combs Servs., 206 W. Va. 512, 518, 526 S.E.2d 34, 40 (1999).

Further, there was communication between the two courts. The West Virginia Family Court Judge clearly indicates in his August 9, 2006 Order that 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 same, but due to the case loads and dockets of the respective courts, they have been unable to engage in direct verbal communications. Because the courts were not successful in having direct verbal communication, certainly does not mean that the other forms of communication that did transpire between them should be disregarded. It is apparent that the two conflicting courts have communicated through writings, their orders and have unsuccessfully attempted, although not required, verbal communication.

The Appellant relies on several cases, which in addition to being outside of our jurisdiction, more importantly, were decided under the UCCJA, not the current controlling statute, the UCCJEA. This is significant because the provisions of the UCCJEA, wherein home state status trumps all other claims for jurisdiction except those based on abandonment or emergency, was enacted in order to give conflicting courts specific and unambiguous direction as to which state has jurisdiction. Further, in the cases Appellant relies on, there was no communication, in any form, between the conflicting courts. In the case at bar, there is not a blatant failure to communicate, but only an admitted inability to have direct verbal communication. Exchanges of documents, writings and of orders would constitute compliance with a statute, which stated, "shall communicate" let alone a statute, which states, "may communicate".

The very purpose of the inclusion of the portion of the UCCJEA addressing communication between courts was to put sister courts on notice when there are simultaneous proceedings between the same parties in different states ongoing. Thus, once again, the West Virginia Court has continued to strictly comply with the provisions and intentions of the UCCJEA, by continuing to keep the Ohio Court abreast of the proceedings in West Virginia and the West Virginia Court's intentions in accepting and not declining home state jurisdiction and in entering orders regarding custody of the minor children.

D. BECAUSE THE APPELLEE HAS NOT WAIVED HIS RIGHTS UNDER THE UCCJEA, IT SHOULD BE STRICTLY ADHERED TO IN THE CASE AT BAR.

Waiver of a person's rights will not be recognized if it violates public policy. Kelm v. Kelm, 92 Ohio St.3d 223, 749 N.E.2d 299 (2001). Appellee has never asserted that he wished to waive his rights under the UCCJEA. Appellants assert that in helping with the move to Ohio that Appellee constructively waived his rights under the UCCJEA. In Kelm v. Kelm the Court found

that even express waiver in the form of signing away rights in a child custody case was not sufficient to prove that a party's rights were waived⁸. Therefore, this Court should not accept that the Appellee has unknowingly and unintentionally waived his rights to protection under the UCCJEA. It would be wholly violative of public policy and the best interests of the minor children to accept Appellant's argument. The Appellee should be afforded all of the protections that the UCCJEA offers to ensure proper adjudication of the child custody issues before the Court. Thus, because Appellee has preserved his rights under the UCCJEA it should be used to control the case at bar.

VI. CONCLUSION

The Circuit Court of Monongalia County correctly applied the UCCJEA to all aspects of the case at bar. Further, the Monongalia County Circuit Court has not abused its discretion in any way, shape or form. The Court has held true to the purpose, intent, and language of the statute put into place to prevent these exact types of disputes. In failing to adhere to the same standards as the West Virginia Court, the Ohio Court has interfered with the expeditious adjudication of this pressing matter.

VII. RELIEF PRAYED FOR

WHEREFORE, for the reasons set forth above, the Appellee prays that this Court affirm the final order of the Circuit Court refusing the appeal and affirming the Family Court Judge's Order Retaining Jurisdiction Over Child Custody entered August 9, 2006. Further, Appellee

⁸ In Kelm, a mother had signed an agreement waiving her rights to arbitrate, the court did not accept this express waiver because it violated public policy in that it did not comply with the best interest of the child and interfered with the courts role as *parens patriae*

prays that this court will allow West Virginia to continue to adjudicate this case in the proper legal and efficient manner it has demonstrated thus far.

Dated: July 13, 2007

Respectfully submitted,
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Appellee
By Counsel.

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