[Cite as *Burnett v. Burnett,* 2013-Ohio-5174.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Caren C. Burnett

Appellee

v.

Alan L. Burnett, II

Appellant

Court of Appeals No. S-12-041

Trial Court No. 10 DR 853

DECISION AND JUDGMENT

Decided: November 22, 2013

* * * * *

Caren C. Burnett, pro se.

John A. Coble and Joseph F. Albrechta, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Alan L. Burnett, II, appeals the October 4, 2012 judgment of the Sandusky County Court of Common Pleas, Domestic Relations Division, which granted the parties a divorce and divided the marital assets and obligations. Because we find that the trial court lacked personal jurisdiction over appellant, we affirm

the granting of the divorce and custody determination and reverse the portions of the judgment which divided the parties assets and obligations, and ordered appellant to pay spousal support.

{¶ 2} Appellant, Alan Burnett, II, and appellee, Caren Burnett, were married in May 2003, in Ann Arbor, Michigan, and three children were born issue of the marriage. This matter commenced with the July 30, 2010 filing of appellee's complaint for legal separation. At that time, appellee also filed a complaint for temporary custody and, in a separate case, filed a petition for a domestic violence civil protection order ("CPO"). The facts and issues raised regarding the CPO action are set forth in this court's decision in *Burnett v. Burnett*, 6th Dist. Sandusky No. S-10-050, 2012-Ohio-2673, and will be referenced as needed.

{¶ 3} While the CPO appeal was pending, appellant commenced an original action in this court requesting that we issue a writ of prohibition prohibiting the Sandusky County Court of Common Pleas, Domestic Relations Division judge from exercising jurisdiction over appellant in all matters regarding the custody of appellant's children. *See Burnett v. Dewey*, 6th Dist. Sandusky No. S-11-021, 2011-Ohio-4678. We dismissed the writ finding that appellant failed to demonstrate that the court was "patently and unambiguously without jurisdiction." *Id.* at ¶ 21.

{¶ 4} On April 11, 2011, appellee filed an amended complaint for divorce alleging extreme cruelty, incompatibility, and that the parties had been living separate and apart for one year. On January 6, 2012, appellant filed a motion to dismiss the complaint based

on his assertion that the court did not have either the subject matter jurisdiction or personal jurisdiction needed to adjudicate the matter. Appellant based his subject matter jurisdiction on Civ.R. 15(C) which provides that claims asserted in an amended pleading related back to the date of the original filing thus, appellant argued, the complaint for divorce did not comply with the six-month residency requirement. Appellant argued that appellee's actions in filing the complaint in Ohio should not be rewarded and constituted "shameless forum-shopping." Appellant further argued that his complete lack of contact with the state of Ohio demonstrated that the court lacked personal jurisdiction over him.

{¶ 5} On March 20, 2012, the trial court denied appellant's motion to dismiss. The court found that subject matter and personal jurisdiction had been established. Appellant then filed his answer to the complaint again denying that the court had jurisdiction over the matter.

{¶ 6} In May and June 2012, the case proceeded to a final hearing on the divorce. Appellant was not present at the hearing and presented no witnesses. Appellant's sole contention was that the court lacked jurisdiction over the matter. Regarding the issue, the following testimony was presented. Appellee testified that following their 2003 marriage, the parties resided in Whitmore Lake, Michigan. On March 29, 2010, while appellant was in Florida, appellee took their children to her father's house in Bellevue, Ohio. Appellee admitted that she went to Florida with appellant but that she never intended to remain there. She went because appellant took their oldest two children in the moving van with him. Appellee stated that she and appellant signed an apartment

lease in Florida on May 3, 2010. Appellee clarified that on the same day, outside the presence of appellant, she initialed a document pertaining to the termination of the lease; she also secured a storage unit and, according to appellee's testimony, shipped back all of her materials for her business. Appellee testified that while in Florida, she made several calls to an Ohio legal aid office. Appellee also stated that during that time she was making calls to set up where she and the boys would live, and making inquiries as to schools, dentists, and doctors. Appellee admitted that she did not live in Ohio for six months prior to filing the complaint for legal separation.

{¶ 7} Appellee testified that while the parties resided in Michigan, appellant worked for a battery company and serviced accounts in Ohio. Appellee also testified regarding the telephone calls appellant made to her father's house in Ohio, to her cell phone and the threatening texts messages he sent her.

{¶ 8} On July 6, 2012, the trial court entered its divorce decision. The court first found that jurisdiction was proper by noting that "[b]ased upon the reasoning set forth in *Geig v. Geig*, 16 Ohio App.3d 51, this Court is satisfied that proper service has been made upon Defendant, and personal and subject matter jurisdiction clearly exists by virtue of the extensive phone records admitted into evidence * * * and pursuant to the Stipulation of Facts cited below as Plaintiff's exhibit 17." The court then made determinations regarding the parties' assets and liabilities and child custody, support and visitation. The judgment entry of divorce was journalized on July 18, 2012. An

amended judgment entry of divorce was filed on October 4, 2012, and this appeal followed.

{¶ 9} Appellant raises three assignments of error for review:

> Assignment of Error No. 1: The trial court judgment is void because the court lacked jurisdiction over the subject matter of this proceeding.
>
> Assignment of Error No. 2: The trial court judgment is void because the court lacked jurisdiction over the person of appellant.
>
> Assignment of Error No. 3: The trial court erred by denying appellant's motion to dismiss this case for lack of subject matter and personal jurisdiction.

{¶ 10} Appellant's first assignment of error argues that the trial court erroneously presided over and determined the case when it had no subject matter jurisdiction. Specifically, appellant contends that the court lacked subject matter jurisdiction over the complaint for legal separation, the amended complaint for divorce, and child custody matters.

{¶ 11} We will simultaneously address the interrelated issues regarding the legal separation and divorce complaints. R.C. 3105.03 sets forth the residency requirements for actions for divorce and legal separation as follows:

> The plaintiff in actions for divorce and annulment shall have been a resident of the state at least six months immediately before filing the complaint. Actions for divorce and annulment shall be brought in the

proper county for commencement of action pursuant to the Rules of Civil Procedure. The court of common pleas shall hear and determine the case, whether the marriage took place, or the cause of divorce or annulment occurred, within or without the state.

Actions for legal separation shall be brought in the proper county for commencement of actions pursuant to the Rules of Civil Procedure.

{¶ 12} Civ.R. 3 provides for the proper venue for the commencement of an action for legal separation and states, in part:

(B) Venue: where proper

Any action may be venued, commenced, and decided in any court in any county. When applied to county and municipal courts, "county," as used in this rule, shall be construed, where appropriate, as the territorial limits of those courts. Proper venue lies in any one or more of the following counties:

(9) In actions for divorce, annulment, or legal separation, in the county in which the plaintiff is and has been a resident for at least ninety days immediately preceding the filing of the complaint;

* * *

(12) If there is no available forum in divisions (B)(1) to (B)(10) of this rule, in the county in which plaintiff resides, has his or her principal

place of business, or regularly and systematically conducts business activity * * *.

{¶ 13} Appellant first argues that because appellee admitted to living in Florida from May 3 through May 26, 2011, under Civ.R. 3 she did not meet Ohio's three-month residency requirement to commence an action for legal separation. Specifically, appellant contends that when appellee filed her July 30, 2010 complaint for legal separation, she had been a resident for only two months, beginning on May 26, 2010. Conversely, appellee asserts that she began her Ohio residency on March 29, 2010.

{¶ 14} The establishment of residency in a divorce proceeding requires that the plaintiff possess a domiciliary residence as well as the intent to make the state of Ohio a permanent residence. *Heiney v. Heiney*, 157 Ohio App.3d 775, 2004-Ohio-3453, 813 N.E.2d 738, ¶ 14 (6th Dist.). The venue provision of Civ.R. 3(B)(9) requires that prior to the commencement of a divorce or legal separation proceeding, the plaintiff resides for 90 days in the county in which he or she intends on commencing the action. The determination of whether the plaintiff resided in the county utilizes the same residency analysis as R.C. 3105.03. *Swearingen v. Swearingen*, 10th Dist. Franklin App. No. 06AP-698, 2007-Ohio-1241, ¶ 17. Absent an abuse of discretion, an appellate court defers to a trial court's determination regarding the credibility of a party's intent to remain in the state. *Id.* at ¶ 19, citing *Ortiz v. Ortiz*, 7th Dist. Jefferson App. No. 05 JE 6, 2006-Ohio-3488, ¶ 36.

{¶ 15} In addition, as set forth above, Civ.R. 3(B)(12) provides that if there is no other available forum, an action may be commenced where the plaintiff resides, has his or her principal place of business, or regularly conducts business. In the present case, appellee testified at trial that she intended on residing in Ohio when she entered the state on March 29, 2010, and moved in with her father in Bellevue, Ohio. Appellee stated that she only agreed to go to Florida after appellant took two of her children and her belongings in the moving truck.

{¶ 16} Appellee admitted to co-signing a lease in Florida on May 3, 2010. Appellee stated that she returned to the apartment leasing office to change the early termination provision without appellant's knowledge and that she maintained a storage unit which appellant did not have access to. Appellee also stated that on May 6, 2010, she shipped back all of her business supplies to Bellevue, Ohio. Appellee stated that she returned home (to Ohio) on May 26, 2010.

{¶ 17} Appellee admitted to listing the Florida address on a mutual fund so she could receive the proceeds. Appellant's name was also on the fund. Appellee stated that on May 26, 2010, once she received the first of two disbursements into her account, she left for Ohio.

{¶ 18} Based on the evidence presented at the trial, we cannot find that the trial court abused its discretion in finding that appellee either resided in Ohio from March 29, 2010, until the filing of the motion (Civ.R. 3(B)(9)) or that she satisfied the requirement

under Civ.R. 3(B)(12), in that there was no other appropriate venue for bringing the action.

{¶ 19} Appellant further argues that because appellee had not resided in the state of Ohio for six months prior to filing her complaint for legal separation, her amended complaint for divorce related back to the filing of the separation complaint and, therefore, was untimely. We disagree. Legal separation actions are frequently commenced where a party wishes to terminate the marriage but has not yet met the residency requirements for a divorce. *See* 46 Ohio Jurisprudence 3d, Family Law, Section 409 (updated 2013).

{¶ 20} Finally, appellant contends that the court did not have subject matter jurisdiction over the child custody and support issues. As set forth above, in *Burnett v. Dewey*, 6th Dist. Sandusky No. S-11-021, 2011-Ohio-4678, we denied appellant's complaint for a writ of prohibition in both the CPO action and the instant case finding that appellant failed to prove that the court "patently and unambiguously" lacked jurisdiction to determine the child custody issues.

{¶ 21} The Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") was enacted in order to "ensure that a state court would not exercise jurisdiction over a child custody proceeding if a court in another state was already exercising jurisdiction over the child in a pending custody proceeding." *White v. Ritchey*, 7th Dist. Mahoning No. 12 MA 98, 2013-Ohio-4164, ¶ 11, citing *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, 883 N.E.2d 420, ¶ 20-21.

{¶ 22} Ohio's codification of the UCCJEA, R.C. 3127.15, sets forth the jurisdictional basis for an initial custody determination as follows:

> (A) Except as otherwise provided in section 3127.18 of the Revised Code, a court of this state has jurisdiction to make an initial determination in a child custody proceeding only if one of the following applies:
>
> (1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.
>
> (2) A court of another state does not have jurisdiction under division (A)(1) of this section or a court of the home state of the child has declined to exercise jurisdiction on the basis that this state is the more appropriate forum under section 3127.21 or 3127.22 of the Revised Code, or a similar statute of the other state, and both of the following are the case:
>
> (a) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
>
> (b) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

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

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

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

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

{¶ 23} Reviewing the statute, at the time the action was commenced, Michigan was arguably the home state of the children. However, appellant resided in Florida, not Michigan as required under section R.C. 3127.21(A)(1) and Florida declined jurisdiction. R.C. 3127.21(A)(2) supports jurisdiction in Ohio where one of the parents resides in the state and there is evidence regarding the children's care and relationships in the state. Appellee testified regarding the children's schooling and the fact that her parents both live in the state.

{¶ 24} Under R.C. 3727.18(B), a court maintains jurisdiction where there has been no prior custody determination and a child custody proceeding has not been commenced

in a court of a state having jurisdiction. Further, under R.C. 3105.21(A): "Upon satisfactory proof of the causes in the complaint for divorce, annulment, or legal separation, the court of common pleas shall make an order for the disposition, care, and maintenance of the children of the marriage, as is in their best interests, and in accordance with section 3109.04 of the Revised Code."

{¶ 25} Because we determined that the complaint for divorce was proper and that the children reside in Ohio and no other state has exercised jurisdiction over the custody issue, it follows that all matters relating thereto were properly before an Ohio court. We find that appellant's first assignment of error is not well-taken.

{¶ 26} In appellant's second assignment of error, he argues that the trial court lacked personal jurisdiction over him. Appellant's third assignment of error argues that the trial court erred when it denied his motion to dismiss based on the court's lack of subject matter and personal jurisdiction. Because we have previously determined that the court had subject matter over the divorce we will limit our discussion to the issue of personal jurisdiction. Appellant asserts that the court lacked personal jurisdiction over him because he has never lived, worked, or spent any substantial time in Ohio and, thus, lacked the required minimum contacts with the state. Appellant further states that, based upon our decision in the CPO appeal regarding the court's lack of personal jurisdiction over him, and absence of change in the parties' status, the trial court still lacked personal jurisdiction over appellant in the separation and divorce proceedings.

{¶ 27} Quoted in our CPO decision, this court reviews the trial court's judgment regarding personal jurisdiction de novo and must consider:

> The power of a state court to exert personal jurisdiction over a nonresident defendant is limited by the Due Process Clause of the Fourteenth Amendment. *Asahi Metal Industry Co. v. Superior Court* (1987), 480 U.S. 102, 108-09, 107 S.Ct. 1026, 94 L.Ed.2d 92, 102. Due process requires that in order to subject a nonresident defendant to a judgment in personam, the nonresident must have certain minimum contacts with the forum, such that notions of fair play and substantial justice are not offended by requiring him to defend in that forum. *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95, 102. The test for minimum contacts may not be applied mechanically; rather, the facts of each case must be weighed to determine whether sufficient affiliating circumstances are present. *Kulko v. Superior Court of California* (1978), 436 U.S. 84, 92, 98 S.Ct. 1690, 56 L.Ed.2d 132, 141, quoting *Hanson v. Denckla* (1958), 357 U.S. 235, 246, 78 S.Ct. 1228, 2 L.Ed.2d 1283, 1293. *Keller v. Keller*, 6th Dist. Erie No. E-05-006, 2005-Ohio-5258, ¶ 5.

{¶ 28} In determining whether the court has personal jurisdiction over a nonresident defendant the court must first determine whether the defendant's conduct falls within Ohio's long-arm statute and, if so, whether granting jurisdiction would deny

the defendant due process of law. *Dobos v. Dobos*, 179 Ohio App.3d 173, 2008-Ohio-5665, 901 N.E.2d 248, ¶ 12 (12th Dist.). This includes assessing whether the defendant could reasonably expect to be haled into court in Ohio and Ohio's interest in the controversy.

{¶ 29} In addition, Ohio courts have held that, in granting a divorce, a trial court need not have personal jurisdiction over a defendant; however, such jurisdiction is necessary in dividing property and establishing monetary obligations such as spousal support. *During v. Quoico*, 2012-Ohio-2990, 973 N.E.2d 838, ¶ 11 (10th Dist.). In cases involving custody determinations and child support, our analysis, as set forth above, is guided by the UCCJEA which specifically states that personal jurisdiction over a party is not required. R.C. 3127.15(C).

{¶ 30} Again, reviewing *Burnett*, 6th Dist. Sandusky App. No. S-10-050, 2012-Ohio-2673, this court concluded that appellant lacked the necessary minimum contacts with the state in order to grant the petition for a CPO. We specifically determined that the court erroneously "tacked" on information received from an ex parte hearing in order to determine that the text messages appellant sent to appellee were threatening in nature. Absent this "tacking" the content of the texts which the court found to be tortious in nature and which we found to be "essential," was lacking in regard to the issuance of a domestic violence CPO.

{¶ 31} In the present case, there is simply not enough evidence to show that appellant had the necessary minimum contacts to Ohio to obtain personal jurisdiction

over him. Appellant never lived in Ohio and, other than some unsupported allegations, never worked in Ohio. Appellant did place telephone calls and texts to Ohio, but those calls do not relate closely enough to the subject of the action to confer specific jurisdiction. *See Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784.

{¶ 32} In sum, having subject matter over the action and according to the UCCJEA, the court had jurisdiction to make custody determinations. However, because the court lacked jurisdiction over appellant, it lacked jurisdiction to divide assets and debts and order appellant to pay spousal support. Based on the forgoing, we find that appellant's first assignment of error is not well-taken. Appellant's second and third assignments of error are well-taken, in part. Specifically, appellant's assignments of error are well-taken as it pertains to the property and debt division and the order of spousal support and those portions of the judgment are vacated. The matter is remanded for further proceedings consistent with this decision. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

Judgment affirmed in part
and reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.