



Court: Crawford-Pittsburg District Court
Case Number: 2017-CV-000131-P
Case Title: O. Gene Bicknell, et al. vs. Kansas Department of Revenue
Type: Decision on Petition

SO ORDERED.

A handwritten signature in black ink, appearing to read "Richard Smith", is written over a horizontal line.

/s/ Honorable Richard Smith, Senior Judge

**IN THE ELEVENTH JUDICIAL DISTRICT
DISTRICT COURT OF CRAWFORD COUNTY, KANSAS
SITTING AT PITTSBURG**

IN THE MATTER OF THE APPEAL OF)
O. GENE BICKNELL & RITA J. BICKNELL,)
FROM THE ORDER OF THE BOARD OF TAX)
APPEALS AFFIRMING THE DEPARTMENT) 2017-CV-000131-P
OF REVENUE’S ORDER ASSESSING)
ADDITIONAL INCOME TAX, INTEREST,)
AND PENALTIES IN BOARD OF TAX)
APPEALS DOCKET NO. 2010-8529-DT.)

DECISION AND JOURNAL ENTRY OF JUDGMENT

“[W]hat the law means by domicile is the one technically pre-eminent headquarters, which, as a result either of fact or of fiction, every person is compelled to have in order that by aid of it certain rights and duties which have been attached to it by the law may be determined.” -*Hon. Oliver Wendell Holmes Jr., Chief Justice, Supreme Judicial Court of Massachusetts, Suffolk, 1898.*¹

PARTIES

O. Gene Bicknell (Gene) and his wife Rita Bicknell, (Rita), are the petitioners. Kansas Department of Revenue, (KDOR), is the respondent. The KDOR determination was first appealed to the Kansas Court of Tax Appeals (COTA), forerunner of the Kansas Board of Tax Appeals (BOTA), the author of the order now appealed. The Kansas Court of Appeals (COA) has considered aspects of this dispute hearing appeals from two separate district court proceedings. The Court of Appeals decisions

¹ *Bergner & Engel Brewing Co. v. Dreyfus*, 172 Mass. 154, 157, 51 N.E. 531, 532 (1898)

(unpublished) we shall reference as either *Bicknell I, Bicknell v. Jordan*, 2014WL1302634, 321 P.3d 37 (March 28, 2014) and *Bicknell II, In Re Bicknell*, 2015WL5613069, 356 P.3d 457 (September 25, 2015).

What follows are the reasons this court enters orders reversing the Board of Tax Appeals Summary Decision upholding the KDOR Written Determination O. Gene Bicknell was a Kansas Resident in 2005 and 2006 and reversing KDOR's Written Determination as it is not supported by the evidence.

BACKGROUND

On October 1, 2010, the KDOR issued a final written determination assessing additional income tax, penalties, and interest against the Bicknells for tax years 2005 and 2006. The total amount of the assessment was \$42,544,676. The sole issue in controversy involved the residency status (“domicile”) of Gene during the tax years in question. The Bicknells filed an appeal from the KDOR assessment with the Court of Tax Appeals (COTA). The sole issue in the COTA appeal was whether Gene was a resident of Kansas or Florida; it is undisputed that Rita was domiciled in Kansas until at least 2008.

While the COTA appeal was pending, the Bicknells filed a parallel petition in the Shawnee County District Court seeking a declaratory judgment that K.A.R. 92–12–4a—a regulation adopted by KDOR for use in determining a taxpayer's ‘domicile’—is unconstitutional both on its face and as applied by KDOR.

On March 8, 2013, the first day of the hearing before COTA, the Shawnee District Court entered its memorandum decision and order granting KDOR's motion to dismiss. The district court ruled that it lacked subject matter jurisdiction over the constitutional challenge to matters still pending before COTA. The COA in *Bicknell I* tasked solely with the question of whether the trial court had jurisdiction

held that the trial court properly determined that it lacked subject matter jurisdiction over the Bicknells' declaratory judgment action. 2014 WL 1302634.

Ultimately the proceeding before COTA that began in March 2013 culminated in COTA rendering a decision that Gene was a resident for Kansas income tax purposes during 2005 and 2006 upholding the KDOR determination. Bicknells appealed that matter to the COA.

The Kansas Legislature, while this matter was pending, passed legislation which brought about significant relevant consequences. It seems there was a general awareness within the legislature that this new legislation specifically impacted this dispute.

The appellate process in existence prior to this legislative change designated an entity known as COTA as the quasi-judicial administrative authority to which a taxpayer first appealed a KDOR order or determination. COTA was the administrative authority that heard Gene's appeal from the KDOR written determination. Under this scheme, decisions of COTA were then appealed to the Kansas Court of Appeals pursuant to the Kansas Act for Judicial Review.² Gene so appealed. The COA decision was issued in 2015. KDOR petitioned the COA for rehearing. After that petition was denied, KDOR petitioned the Supreme Court for review and that petition was denied as well.

As referenced above, while this appeal was working its way through the existing regulatory scheme, the Kansas Legislature reconfigured the statutory framework for appeal of KDOR determinations. The COTA was replaced by a re-structured administrative authority known as BOTA. 2014 Kansas Laws Ch. 141 (S.B. 231) Kansas 2014 Session Laws Regular Session. The nature of the administrative review remained the same. Pursuant to K.S.A. 74-2438(b), absent a stipulation for and appeal on the record, BOTA is to hear the matter *de novo*.

² K.S.A. 77-601 et. seq.

With the creation of BOTA the legislature had effectuated changes of great import. Unlike the COTA framework (where all KDOR appeals were to the COA) the new structure provided taxpayers an option to appeal to the district court. K.S.A. 74-2426(c).

The nature of this appeal is contested by KDOR. In pretrial motions the court determined the Kansas Legislature was expressly determined to carve out an exception to *Frick v. City of Salina* and its progeny and ensure a truly *de novo* consideration by including the “explicit legislative direction otherwise” referenced in syllabus paragraph 9.³ *Frick v. City of Salina*, 289 Kan. 1, 208 P.3d 739 (2009). The statute at issue is K.S.A. 74-2426. 2016 Kansas Laws Ch. 112 (S.B. 280) Kansas 2016 Session Laws.

The legislature’s intent to meet the requirement of explicit legislative direction is clear from the unique language⁴, explicit and frankly redundant reiteration of the term *de novo* together with an expressed definition.

At the election of a taxpayer, any summary decision or full and complete opinion of the board of tax appeals issued after June 30, 2014, may be appealed by filing a petition for review in the district court. **Any appeal to the district court shall be a trial *de novo*. Notwithstanding K.S.A. 77-619, and amendments thereto, the trial *de novo* shall include an evidentiary hearing at which issues of law and fact shall be determined anew.** District court review of orders issued by the board relating to the valuation or assessment of property for ad valorem tax purposes or relating to the tax protest shall be conducted by the court of the county in which the property is located, or, if located in more than one county, the court of any county in which any portion of the property is located. K.S.A. 74-2426(c)(4)(B) (emphasis supplied).

³ *Frick* concerned K.S.A. 58–3509(a), providing for appeal to district court an administrative hearing examiner's determination of relocation benefits. The statute merely stated such appeal shall be a trial *de novo*, a phrase susceptible to more than one interpretation. Ordinarily an appeal does not signify a new action, it signifies a review of a decision. This ambiguity coupled with application of the rule of strict construction made *de novo* review of administrative actions the appellate nature of the district court's authority by the mere inclusion of the term *de novo* in the enabling legislation “unless there is explicit legislative direction otherwise.” The ruling in *Frick* limited district court’s to making independent findings of fact and conclusions of law based upon the agency record.

⁴ No other Kansas statute regarding *de novo* appeal of an administrative decision contains the highlighted language. This language has never been held to restrict a reviewing district court to a determination on the record.

The legislative record contains an abundance of testimony all of which indicating that the legislature understood that, if passed, 2016 SB 280 would allow for a complete retrial of the issues. The Governor vetoed the measure and his message focused on the *de novo* nature of the appeal the legislation was creating. He drew specific reference to the possible impact on the disposition of the instant controversy.⁵ Protocol includes the reading of a veto message to both legislative bodies. After hearing Gov. Brownback's explicit concerns with a possible *de novo* consideration at the district court level, in what appears to have been a bi-partisan expression of unified-legislative-intent the veto was overridden by the Senate 39 to 1 (Only Senator King voting nay) and in the House 120 to 0.⁶

The economy constructed with BOTA as the capstone was designed by the legislature with features that further indicate legislative intent. The *de novo* appeals are available only to the taxpayer limiting the availability and strongly suggesting its unique character. Only these appeals are heard by the district court with the Court of Appeals retaining its jurisdiction to hear original appeals from BOTA on the record. This suggests intentional use of the trial court system accustomed and equipped for that type of review. Finally, the legislature made a provision for BOTA to issue decisions in two different formats. They may issue a summary decision, as they did in this matter, or they may issue what the statute refers to as a full and complete decision. See K.S.A. 74-2426. It is difficult to perceive a situation where the Court of Appeals would not send the matter back on remand while it is a waste of time for

⁵ "The bill that I am vetoing today... would for the first time allow tax cases... to the Board of Tax Appeals to then... appeal to a district court, where... an entirely new trial [would] decide all of the issues over again. ... The new appeal rights... would be very beneficial to parties... and... to one case in particular. The State of Kansas is currently litigating an income tax matter in which the state has received a tax deposit of \$48,467,227.00. The taxpayers in that case, Mr. and Mrs. O. Gene Bicknell..."

⁶ This information is relevant only to aid the court in discerning legislative intent. It is different than evidence the court allowed subject to objection including a legislator's opinion of the probable outcome of a district court appeal, an alleged statement by the then Sec. of Revenue of having orders from then Gov. Sebelius to go out and find revenue, other evidence that might infer the KDOR and or BOTA decisions were purely outcome driven and the evidence of internal KDOR memos suggesting problems or flaws in KDOR's position. None of this evidence was considered effectively sustaining KDOR's objections. That evidence either was not relevant, immaterial to a determination of, or invasive of the exclusive province of the court.

BOTA to prepare a full and complete decision only to have the matter undergo a full-blown *de novo* review.

Re-visitation of this earlier determination by the court is to reiterate and reinforce the *de novo* nature of review. The court believes it is carrying out the specific intent of the Kansas Legislature as they expressed it in statute. Nevertheless, the directives of *Bicknell II* remain operative. This court's review necessarily includes heeding the criticisms the COA leveled at COTA and compliance with the COA directives on remand. KDOR's suggestion *Bicknell II* is somehow less entitled to consideration as the rule of law of this case is without basis. In this instance, marching toward the border of the contemptuous conveniently ignores the COA's denial of rehearing and the Supreme Court's denial of KDOR's petition for review.

A plain reading of *Bicknell II* includes a direction COTA demonstrate application of applicable KDOR administrative regulations. BOTA ignored this directive. That order was binding as to BOTA as the successor of COTA. 2016 SB 280 has no obvious provision modifying BOTA's regulatory responsibilities for its agency nor were the KDOR's or BOTA's responsibilities to follow promulgated regulations modified. As compliance with that order of remand remains an issue closer examination of the COA decision and the pertinent history leading to it is appropriate.

The BOTA decision under *de novo* review is a remand by the COA of a COTA determination that Gene was a Kansas resident in 2005 and 2006. The COA ordered remand for adjudication of Gene's domicile using the KDOR regulations.⁷

Gene and Rita successfully argued to the COA that COTA had ignored K.A.R. 92-12-4 (2006) and almost all K.A.R. 92-12-4a.

⁷ *In re Bicknell*, 356 P.3d 437 (Unpublished, Kan. Ct. App. 2015) (*Bicknell II*).

The COA reminded those concerned it is well established that COTA must furnish adequate support or reasons for its decisions, citing K.S.A. 2014 Supp. 77–621(c)(7). Nevertheless, COTA had failed to provide any analysis or explanation for its failure to discuss the evidence considering the KDOR regulations promulgated to establish criteria on which to determine residency. The resultant vacuum included a failure to mention, let alone discuss, all but one sub section of two successive regulations. By ignoring the regulations with their criteria for determining tax-residency status, the COA was prevented from determining under K.A.R. 92–12–4 (2006) and K.A.R. 92–12–14a whether substantial evidence supported COTA’s decision that Gene was a resident of Kansas rather than Florida for the tax years 2005 and 2006. The COA necessarily remanded for determination by COTA the issue of Gene’s tax-residency status for the years 2005 and 2006 under K.A.R. 92–12–4 (2006), K.A.R. 92–12–4a, controlling statutory law, and case law. This is now a *de novo* trial of that readjudication consistent with the directives of the COA in *In re Bicknell*, 356 P.3d 437 (Kan. Ct. App. 2015).

Because COTA ignored and failed to apply the KDOR's regulations in determining the issue of Gene's domicile, we vacate COTA's decision and remand this case to COTA for readjudication consistent with this opinion. On remand, COTA should consider K.A.R. 92–12–4 and K.A.R. 92–12–4a along with controlling statutory law and caselaw in determining Gene's tax-residency status for the years 2005 and 2006.

KDOR continues to insist this court need only determine BOTAs’ actions reasonable. Despite the strong language employed by the COA directing specificity, BOTA deems the following as compliance with the order of remand: “After application of the applicable KDOR regulations, statutes and case law to the record evidence, pursuant to the instructions of the Kansas Court of Appeals the Board finds that the taxpayers has [sic.] not presented evidence to satisfy their burden to show satisfactory proof that Mr. Bicknell acquired a new domicile in the State of Florida during the period at

issue."⁸ It is respectfully submitted this conclusory statement not only defies the COA directive, it is difficult to perceive how any appellate body under any standard of review could ascertain whether substantial evidence supported the BOTA decision.

If the evidence supported any of the factors listed in section (b)(7)(A-S) of the regulation effective March 2006, we don't know if there was evidence of any of the factors listed in section 3 of the earlier regulation. We cannot discern whether there were any presumptions considered. There wasn't any analysis provided from which it can be determined what evidence the decision was based on. It would seem only two alternatives are available. Either remand for specificity or reversal.

The COA stated a principle that should be so obvious no authority is required. An administrative agency cannot ignore regulations it promulgates. So, analysis should begin with the controlling statutes and the regulations adopted thereunder. The controlling statute, K.S.A. 79-32,109(b), states:

‘Resident individual’ means a natural person who is domiciled in this state. A natural person who spends in the aggregate more than six months of the taxable year within this state shall be presumed to be a resident for purposes of this act in absence of proof to the contrary. A nonresident individual means an individual other than a resident individual.⁹

Under K.S.A. 79-3236, the Secretary of the Department of Revenue (Secretary) promulgated the following regulations regarding tax-residency status. Before March 24, 2006, the applicable regulation was K.A.R. 92-12-4 which stated the following:

⁸ The court is aware of the provision for requesting a more detailed decision a taxpayer could request under the modification to the statute. It is difficult to see that amendment as relief from an appellate court order. This would seem to be further indication that the legislative intent was for a true *de novo* appeal. Since the legislature made a provision for both a short-abbreviated order and request for a lengthier amplified detailed order is difficult to imagine any result from one of the shorter orders other than a remand every time which would just precipitate unwarranted and unnecessary delay. The nature of the order is irrelevant if the appeal is a true *de novo* hearing.

⁹ The terms “residence” and “domicile” are often synonymous, but this is not universally so. The Uniform Interstate Family Support Act being an example of clearly distinguishing between the two. See *State ex rel. SRS v. Ketzell*, 47 Kan. App. 2d 536, 542, 275 P.3d 923, 928 (2012). In the instant context the statute uses one term to define the other indicating for the purposes concerned the terms are synonymous and the authorities where such is the case potentially relevant and persuasive.

- (a) 'Domicile' shall mean that place where a person resides, where the person has an intention to remain, and to which the person intends to return following any absence.
- (b) To constitute a change in domicile, there shall be intent to change, actual removal, and the acquisition of a new domicile. The domicile shall not be changed by removal for a definite period or for particular purposes nor by abandonment of the old domicile until the acquisition of a new one is affected.
- (c) A voting residence shall constitute evidence of domicile. The state where an individual's driver's license is issued and the state where an individual's vehicle is registered shall constitute evidence of domicile.

On March 24, 2006, K.A.R. 92-12-4 was revoked and replaced by K.A.R. 92-12-4a.

Considerably more detailed, the new regulation provides:

- (a) As used in this regulation, the term 'Kansas resident' shall have the same meaning as that assigned to the term 'resident individual' in K.S.A. 79-32,109, and amendments thereto.
- (b) This subsection shall apply in determining whether a natural person is a 'resident individual,' as the term is defined in K.S.A. 79-32,109 and amendments thereto, on the basis that the person's domicile is within Kansas.
 - (1) Subject to the further conditions and requirements in this subsection, 'domicile' shall mean that place in which a person's habitation is fixed, without any present intention of removal, and to which, whenever absent, that person intends to return.
 - (2) Each person shall have only one domicile at any particular time. Once shown to exist, a domicile shall be presumed to continue until the contrary is shown. The absence of any intention to abandon an existing domicile shall be considered to be equivalent to the intention to retain the domicile.
 - (A) A person who leaves that person's domicile to go into another jurisdiction for temporary purposes shall not be considered to have lost the domicile. The mere intention to acquire a new domicile, without the fact of physical removal, shall not change a person's domicile, and the fact of physical removal from a person's domicile, without the intention to remain absent, shall not change that person's domicile.
 - (B) If a person whose domicile is in Kansas is absent from Kansas for more than six months of the tax year, that person shall not be presumed to have lost that domicile. If a person leaves this state to accept a job assignment in another jurisdiction, that person shall not be presumed to have lost that person's domicile in this state.
 - (C) A person who is temporarily employed within this state shall not be deemed to have acquired a domicile in this state if, during that period, the person maintains that person's domicile outside of the State of Kansas.
 - (3) A person shall be considered to have established that person's domicile in Kansas on the date that the person arrives in the state for other than temporary or transitory purposes. A person shall be considered to have abandoned that person's domicile on the date that the person leaves the state without any intention to return to Kansas.
 - (4) Any citizen of a foreign country may acquire a domicile for Kansas tax purposes without surrendering that person's rights as a citizen of that country.

(5) Except for a person who is covered by the provisions of the soldiers' and sailors' civil relief act of 1940, 50 U.S.C. app. § 574, as amended by the servicemembers civil relief act, public law 108-189, there shall be a presumption that the place where a person's family is domiciled is that person's domicile. The domicile of a person who is married shall be the same as the person's spouse unless there is affirmative evidence to the contrary, the husband and wife are legally separated, or the marriage has been dissolved. When a person has made a home at any place with the intention of remaining there indefinitely and the person neither lives at the home in which the person's family lives nor intends to do so, then that person shall be deemed to have established a domicile separate from that person's family.

(6) If a minor child is not emancipated, the domicile of the child's parents shall be the domicile of the child. The domicile of the parent who has legal custody of the child shall be the domicile of the child.

(7) The following factors may be considered in determining whether or not a person's domicile is in this state for the tax years in question, although none of these factors shall, by itself, be a determinant of a person's domicile:

(A) The percentage of time that the person is physically present within the State of Kansas and the percentage of time that the person is physically present in each jurisdiction other than the State of Kansas;

(B) the location of the person's domicile for prior years;

(C) the location at which the person votes or is registered to vote, except that casting an illegal vote shall not establish a domicile for income tax purposes;

(D) the person's status as a student;

(E) the location of services performed by the person in the course of employment;

(F) the classification of the person's employment as temporary or permanent;

(G) the change in the person's living quarters;

(H) the person's ownership of other real property;

(I) the jurisdiction in which the person has been issued a valid driver's license;

(J) the jurisdiction from which any motor vehicle registration was issued to the person and the actual physical location of the person's vehicle or vehicles;

(K) the purchase of any resident fishing or hunting licenses by the person;

(L) the filing by the person of a Kansas tax return, report, or application as a Kansas resident or a nonresident individual;

(M) the fulfillment or failure to fulfill by the person of the tax obligations required of a Kansas resident;

(N) the address where personal mail is received by that person and not subsequently forwarded;

(O) the location of the jurisdiction from which any unemployment compensation benefits are received by the person;

(P) the location of any school that the person or the person's spouse attends and whether resident or nonresident tuition was charged, as well as the location of the school attended by any of the person's children who are in grades K-12;

(Q) the representations made to any insurance company concerning the person's residence and on which any insurance policies are issued;

(R) the location where the person, the person's spouse, or the person's minor children regularly participate in sporting events, group activities, or public performances; and

(S) any other fact relevant to the determination of that person's domicile.

(8) The following factors shall not be considered in determining whether or not a person is domiciled in Kansas:

(A) The location of any organization to which the person makes charitable contributions; and

(B) the location of any charitable organization for which the person serves as a board member, committee member, or other volunteer.

The facts as found by the court should first be viewed considering these regulations. The general common law of Kansas should not be ignored and, in fact, if not already specified by a subsection, it is to be considered under subsection (S) of 92-12-4a.¹⁰

A specific statute controls over a general statute¹¹. Likewise, a specific provision within a statute controls over a more general provision within the statute.¹²

DETERMINATION OF DOMICILE¹³

The world simply cannot be devoid of people who would state with the greatest degree of sincerity, "How hard can it be to determine where someone makes her home?" Excluding those persons burdened with an intimate knowledge of legal proceedings that might be the first question which would occur to most people. They would doubtless be unfamiliar with the significance residency has played since the very beginning of Kansas jurisprudence on such issues as the validity of a chattel mortgage (due to the county of residence recordation requirement), the validity of residential service of process, the appropriate venue for a probate case, the eligibility of an elected person to hold office, whether or

¹⁰ The majority in *Bicknell II* directed the consideration of the applicable regulations "along with controlling statutory law and case law in determining Gene's tax-residency status for the years 2005 and 2006." With clear evidence of Gene's Florida residency in both 2005 and 2006 the constitutional issue is not reached. If it were the "Achilles Heel" of the claim of unconstitutionality, both substantive and applied, might be the long-standing principles of Kansas Common law used to determine residency and the requisite flexibility inherent in a case by case determination affords. Arguably, it was a strict adherence to appearance lacking individualized consideration that operated to justify the result reached by COTA in its earlier determination.

¹¹ See *State ex rel. Tomasic v. Unified Gov. of Wyandotte Co./Kansas City*, 264 Kan. 293, 311, 955 P.2d 1136 (1998).

¹² See *In re K.M.H.*, 285 Kan. 53, 82, 169 P.3d 1025, 1043 (2007).

¹³ The observant reader will note two variant spellings. The old English "Domicil" was gradually replaced with jurisdictionally varying speeds with the modern spelling. The quotations in which the older spelling appears are the result of the decision to report those sources without any modification.

not an individual ballot should be counted in a contested election, eligibility for in-state tuition at institutions of higher learning, whether it is possible to sue or be sued in a particular state and, like in the current matter, whether or not one is required to pay taxes.

This list presents only a few of the legal questions which may turn solely on the issue of residency or domicile. Their self-evident significance of those issues explains the motivation one might have to legally contest residency or domicile. Such a great motive often makes for a great number of court cases and thus decisions explaining the methodology for determination. Unfortunately, the very nature of the question involved defies distillation to a single rule or specific list of certain characteristics.¹⁴

It is best that we begin with an understanding of the concept at issue. Domicile is a relationship that the law creates between an individual and a locality or country.¹⁵ Kansas common-law and virtually every other context whether statutory or regulatory defines domicile in a fashion very much like the referenced administrative regulation. It is that place where a person resides, where the person has an intention to remain, and to which the person intends to return following any absence. Although there are instances where the terms domicile and residency are not synonymous in this case the terms are in fact legally equivalent and synonymous. If a person remains in the same physical location from birth through any relevant time frame it is difficult to imagine how domicile might become an issue. For that reason, just like the above referenced administrative regulation, the rules regarding domicile generally follow definition with the criteria which define a change.

¹⁴ The situation has changed little since 1867 where the Kansas Supreme Court made the following observation: The question as to what constitutes a domicile or legal residence, we are well aware is not free from difficulties, as is evident from the fact that writers on jurisprudence have never yet been able to agree upon any precise definition of the word "domicile" which meets with general acceptance. *Hart v. Horn*, 4 Kan. 232, (1867).

¹⁵ 25 Am. Jur. 2d Domicil § 1

Universally recognized is that change of domicile involves two things; physical or bodily presence in a new locality and the intent to abandon the old domicile and adopt the new location, either permanently or indefinitely.¹⁶ The locality in which intent manifests in these terms is almost certainly that person's "home." Although there must always be a concurrence of both the physical presence and intent it is not necessary the intent be conceived at the same time as relocation¹⁷. Duration of time at the new location and its character as a place of abode is unimportant unless and except they have a direct bearing on the issue of intent.¹⁸

The most operative element of establishing residence is intent. While it is not the only factor¹⁹, every attempt to define domicile or residence, every list of factors to be considered, every comprehensive discussion of the legal requirements to establish or to change include intent. Even though we should not rely exclusively on the statements of the person at issue to establish their frame of mind it is their intent to establish a domicile that controls. This requisite mental state of intent must coincide with a physical presence, a physical absence and usually a required physical action or movement. Thus we see it is not sufficient to show just a departure but a removal together with the requirement of an intent to abandon a prior residence or domicile, and intent to establish a new residence or domicile.²⁰ There must be an intent to remain at said residence²¹ or domicile, an intent to return whenever absent.²² But intent does need to form simultaneously in conjunction with a physical presence.²³ No particular timeframe is required, a new residence may be effectuated upon the first day of arrival provided the

¹⁶*Irvin v. Irvin*, 182 Kan. 563, 566, 322 P.2d 794, 797 (1958)

¹⁷ *Supra*.

¹⁸ *Roberts v. Robertson*, 123 Kan. 222, 254 P. 1026; *Blair v. Blair*, 149 Kan. 3, 85 P.2d 1004; and 17A Am. Jur., Domicil, § 18, p. 209. *Irvin v. Irvin*, 182 Kan. 563, 566, 322 P.2d 794, 797 (1958)

¹⁹ *Matter of Phillips' Estate*, 4 Kan. App. 2d 256, 260, 604 P.2d 747, 752 (1980)

²⁰ *Keith v. Stetter*, 25 Kan. 100 (1881); *Palmer Oil & Gas Co. v. Parish*, 61 Kan. 311, 313, 59 P. 640 (1900).

²¹ *Schoof's Estate v. Schoof*, 193 Kan.

²² KAR 92-12-4a(b)(1)

²³ *Restatement (Second) of Conflict of Laws*, p. 61.

requisite intent to establish residence is concurrently present.²⁴ The word intent appears 12 times in just the two successive versions of the administrative regulation covering the two years at issue.

The analysis of a person's intent to establish a residence or domicile is not limited just to their intent to physically remove themselves from one location and the intent they have in relocating and then permanently residing at the subsequent location. Virtually all aspects of a person's life are now called into question. This is a necessary function of the nature of the inquiry involved. The determination of domicile seeks to use objective criteria to establish a subjective concept, i.e., the mental state, the intent of the person in question.²⁵ This search is not subject to a formula, rather it is dependent upon the facts of each case and even if there are recognized objective considerations their relative weight is not capable of standardized quantification.²⁶ The trial court must examine all the surrounding facts and circumstances, including declarations of the person claiming residence.²⁷ Almost anything that bears on a person's attitude of mind toward a place is admissible in evidence. The court should consider what a person represents as his intent but place greater if not controlling emphasis upon a person's home life and upon what he does. "Actions speak louder than words."

The record necessarily presents a superabundance of material. From this plethora of information, the evidence that was potentially relevant was culled. At this stage, relevance encompasses anything that potentially demonstrates an objective indicator of Gene's subjective intent²⁸ to make either Kansas or Florida his residence. The subject time frame is virtually any point in time from 1990 through

²⁴ *Blair v. Blair*, 149 Kan. 3, 85 P.2d 1004 (1939); *Arnette v. Arnette*, 162 Kan. 677, 178 P.2d 1019(1947).

²⁵ *Peck v. Univ. Residence Comm. of Kansas State Univ.*, 248 Kan. 450, 464–65, 807 P.2d 652, 662 (1991)

²⁶ *Hooban v. Boling*, 503 F.2d 648, 652 (6th Cir.), cert. denied 421 U.S. 920, 95 S.Ct. 1585, 43 L.Ed.2d 788 (1974).

²⁷ *Gleason v. Gleason*, 159 Kan. 448, 450–51, 155 P.2d 465, 467 (1945).

²⁸ Any determination of domicile seeks to use objective criteria to establish a subjective concept. *Peck v. Univ. Residence Comm. of Kansas State Univ.*, 248 Kan. 450, 464–65, 807 P.2d 652, 662 (1991)

the specific years in question and including the years thereafter. The inclusive nature of such a wide-ranging timetable is dictated by the rules of determining residency and domicile.²⁹

The task required to judge evidence as determinative requires both commentary and clarification. The unavoidable requirement of evaluating persuasiveness became the nexus of evidence in conflict. The diametric opposition of the advocacy formed a dichotomy between Gene's alleged domiciles. The advocate of each domicile trying to dominate in quantity and quality while denigrating and/or diminishing the significance of the offerings of the other side of the dichotomous paradigm. Obviously, there is nothing unique about the juxtaposition of the parties' positions and presentation. It is made noteworthy because of the resulting emphasis on credibility necessary to resolve conflicting and contradictory evidence.³⁰ This required the court, at times despite arguments to the contrary, look to the totality of the circumstances present. No particular significance could be assumed without consideration of other credible evidence which might impact suggested context or even what conclusion, or proof might reasonably be drawn therefrom.

This is a task nearly every trial assigns in some degree, but in the instant matter the volume of information offered combined with the oppositional interpretation subjected to nearly every shred of evidence made exceptional the normative requirement of careful and thorough evaluation of weight and credit of the evidence. No single factor was more decisive resolving conflicts in evidence than credibility.

²⁹ Administrative regulation. K.A.R. 92-1-4a(b)(7)(B), which is arguably a codification of Kansas common law makes a person's domicile in the years preceding relevant. Obviously, the years at issue are relevant. Case law has found significance in the actions suggesting intended domicile after the time period at issue. See *Hart v. Horn*, 4 Kan. 232, 238-40 (1867). Thus, a court must remain open to at least the possibility relevant evidence may include that establishing historically previous domicile, domicile during time in question, and domicile for periods thereafter.

³⁰ Great deference given triers of fact as they often resolve contradictions such as conflict being testimony by utilizing their opportunity to observe the witnesses and evaluate their demeanor. *In re Rumsey*, 276 Kan. 65, 76, 71 P.3d 1150, 1158 (2003), as corrected (July 18, 2003), reinstatement granted, 279 Kan. 264, 107 P.3d 1233 (2005)

The pertinence of credibility required a constant awareness of apparent demeanor, body language, voice inflection, relation to other evidence as well as the evidence as a whole, potential bias, prejudice or favor, whether rational and/or logical, and simply whether it made common sense. If the evidence was then deemed to be sufficiently credible, the court was then required to recapitulate through an analysis in order to determine the weight to be ascribed.

This is not to suggest that the court believed itself to be some sort of human polygraph. No one has an infallible corner on human veracity. Nevertheless, after exclusion of evidence found lacking weight and or credit, the conflicting nature of the evidence made requisite, the assigning of a weight relative to the determination of domicile which considered all evidence so admitted and deliberated upon. This needed to take place in a paradigm that appropriately considered the factors of the administrative regulations as directed by the COA in *Bicknell II*.

The natural fallout from any court assigning different weights to evidence is usually clarification and focus on that evidence the court finds most persuasive. Frankly, there was evidence which the court found very persuasive because it simply made sense and was therefore believable. There was evidence which was met with enough skepticism as to render it much less significant. Some evidence was found believable and highly persuasive without corroboration. Other evidence was not believable even though it wasn't contradicted.

This is not intended as some feigned attempt to boast some pretended insight into the epistemology of jurisprudence. Rather it is to bring light to the difficulty in making determinations of domicile. Possibly one of the more eloquent descriptions of this difficulty is made by the American Law Institute in the Restatement (Second) of Conflict of Laws. The Arizona Supreme Court in *Arizona Bd. of Regents v. Harper*, 108 Ariz. 223, 228, 495 P.2d 453, 458 (1972) quoted lengthy passages from the Restatement and this is been cited with approval by our own Kansas Supreme Court in *Peck*:

Burden of Proof. A domicile is not lost until another has been acquired, and the burden of establishing a change of domicile is upon the party who asserts it. . . . This principle is heavily relied upon by the courts. The amount of evidence necessary to satisfy this burden depends upon the facts of the particular case. Less is required, for example, when the person has been absent from his domicile for a considerable period of time. P. 81.

Evidence. In addition to legal capacity, the requisites for the acquisition of a domicile of choice are physical presence and a certain attitude of mind toward the place in question. . . . Physical presence raises no particular problem of proof, and the cases have been concerned almost entirely with the required attitude of mind. P. 81.

Proof of Intention. A person's intentions must be determined in the light of his declarations and other conduct and of the circumstances in which he finds himself. The evidence will often be equivocal, and the principal difficulty in domicile cases lies not so much in the rules themselves as in the evaluation of the facts, especially with respect to intention . . . ' P. 72.

So, like all other courts which embarked on a determination of domicile, this court was tasked with deciding the truth of a person's mental attitude. At issue in this case is Gene's "attitude of mind" concerning his intended residence in the years 2005 and 2006. This reconstruction in retrospect required evidence be judged in relation to all factors that bore on credibility such as veracity (propensity and/or probability of truth and accuracy), believability (fitting in the scheme of common sense), and viability (maintain its credible nature when compared to other facts and circumstances). Such analysis naturally persuades one as to what credible evidence most reliably determines truth and thus carries the most weight. Thus, the court arrives at its determination as to Gene Bicknell's true intention "in the light of his declarations and other conduct and of the circumstances in which he [found] himself."

This admittedly tedious description of the undertaking intended to grasp the truth is intended to explain the mental process involved in making these determinations and is also offered as an introduction to the general or categorical findings and conclusions that will be addressed prior to a recitation of more particularized findings. The evidence in this case established conclusions which carried implications impacting the other evidence and the court's ultimate conclusions.

GENERAL FINDINGS AND DEDUCTIONS

The first array of these overarching findings relates to motive. Included is the absence of evidence suggesting an improper motive and the resultant impact (or lack thereof) of construing evidence in a light more favorable to either party. It also includes whether motive is relevant, particularly where the necessary proof of change of domicile exists.

The parties' stipulation that Gene did not intend to commit tax fraud did not totally dissuade KDOR from making suggestions seemingly at odds with this stipulation, insinuated at times during the trial and argued more subtlety in closing arguments. KDOR³¹ implied Gene's behavior might place on a morality spectrum somewhere between evasive and unseemly so long as such classification falls short of alleging criminal tax fraud. This is pointed out, not to criticize KDOR, but to acknowledge for the record the court's consideration of KDOR's suggestions of improper intent.

After processing the evidence relevant to motive, this court concludes throughout the period of 2005, 2006, and the years immediately preceding Gene's motives regarding domicile were sincere. There is no evidence Kansas income tax avoidance was a motivating factor. There is some evidence of inquiring about tax consequences. Gene being oblivious to tax implications is not believable. Nevertheless, there's no evidence of an intentional scheme to move to Florida to avoid the taxes now claimed. Even the implications of the language "tax avoidance" cast greater negative aspersions on Gene's motives than the evidence warrants. This is not a situation where the evidence supports a design or plan on the part of Gene to purposefully deprive the State of Kansas of revenue to which they were rightfully entitled. To borrow a phrase from equity his "hands are clean." If the contrary were true, the

³¹ It was KDOR's obvious implication if not outright position that this manifest intent was more malevolent than innocent.

court would have been much more likely to construe evidence in favor of KDOR and against Gene when appropriate.

The lack of evidence suggesting a motive or desire to effectuate a change in domicile to Florida merely for tax avoidance together with Gene's contemporaneous actions and statements, the facts and circumstances then in existence, and Gene's testimony regarding his intent combined to convince the court by clear proof that there was a bona fide intention to first establish Florida as his residence and domicile. He then made the *bona fide* decision to choose and establish Kansas as his residence and domicile. Finally, in the time period immediately preceding 2005 and 2006³² he again chose Florida as his residence and domicile. Each time his motive included the intent of abandoning the previous domicile with the then existing intent of not returning, indefinitely. His motive was coupled with physical presence and an intent to make the chosen domicile his residence, indefinitely. This was the result of circumstances changing in Gene's life and his reaction there to. His motive was based on his life circumstances and as they changed his authentic, genuine intent as to domicile changed.

The complicated chronology and fact that this bona fide intention paradigm can be equally applied to Gene's decision to return to Kansas and make it his home does not necessarily suggest that he never abandoned Kansas in the first place. Thus, we see significance in the wording of the case law and the Restatement (Second) of Conflict of Laws that a change must be to a new location either permanently or *indefinitely*. The defining concept is the sincere intent at the time of the change. But, as important as sincere intent might be it alone is not enough.

The court declined Gene's counsel's suggestion that if Gene's testimony is found to be honest, sincere and believable the court could rule in favor of his position on domicile based solely thereon.

³² Sometime during 2003-2004, a precise date not necessary, but certainly before January 1, 2005.

Kansas law is clear that such reliance cannot be the sole and only consideration.³³ Proof of the this rule's historicity, and its corollary the degree to which stated intent can vary from the determinative evidence may be found in an ancient Kansas case which; "...[r]ecognizes that the person's stated intent as to their desired domicile might be totally without credibility and yet substantiated by the surrounding facts and circumstances."³⁴ We will return to this enigmatic statement later in the opinion.

Another aspect of sincere motive is the credibility of the evidence offered concerning Gene's intent to make Florida his legal residence. The court is convinced by the evidence that Gene had an intent to eventually establish Florida as his residence when he purchased the property in 1999. He purchased the Florida home property with the specific plan that someday it would be his home, his legal residence.

The next important reference is the context of point in time. There are two seminal dates that greatly impact perception of circumstances then existent and thus impact weight and credit of evidence.

The first such date is the date Merrill Lynch approached Gene regarding a potential sale of NPC. The evidence indicated that Merrill Lynch approached Gene and/or other principles of NPC regarding an interest to purchase in late 2005. The significance of this date is that up to this point in time there was no evidence of any event that might present tax ramifications of an unusual or exceptional nature. Evidence of statements and actions during the time frame up until the purchase offer might be accorded greater weight and credit than evidence at some other time when a motive might have been present.

The second influential date is the date Gene and Rita were notified that the Department of Revenue was taking a second look at their tax return. On September 4, 2007, Gene and Rita received

³³ *State ex rel. SRS v. Ketzel*, 47 Kan. App. 2d 536, 536, 275 P.3d 923, 925 (2012). And as earlier stated, a person's actions are more probative than their self-serving descriptions of their state of mind.

³⁴ *Garlinghouse v. Mulvane*, 40 Kan. 428, 19 P. 798, 800 (1888).

notice by letter that the KDOR was looking into their residency status. Up to this point in time Gene had no knowledge that his residency designations were or might be at issue. Evidence of actions and statements between the time Gene was aware of Merrill Lynch's up to the time he was made aware of KDOR's investigation might be afforded less weight and credit than evidence prior to the purchase offer but would certainly have greater weight and credit than any evidence of statements and actions after knowledge of the audit.

The issues presented by this case require that we look in retrospect and evaluate the evidence which would constitute an objective demonstration of the manifestation of that intent.

The legal test for residency is purely fact driven³⁵ and requires an individual analysis, case-by-case. "The concept is not subject to a formula but depends upon the facts of each case. The relative weight to be given each objective factor is not capable of quantification."³⁶ The directive to analyze and consider the person's declarations, other conduct and the circumstances in which he is finds himself, may include an inherent duty that the analysis be reasonably and appropriately circumspect. It certainly is not a command that the field of inquiry be absolute or even restricted. "By way of conclusion, almost anything that bears on a person's attitude of mind toward a place is admissible in evidence."³⁷ It can potentially reference most if not all aspects of a person's life.

The analysis of the objective evidence proving a person's subjective intent begins with trying to identify a habitation that is a "home."³⁸ "A person's domicile is usually the place where he has his home" *Restatement (Second) of Conflict of Laws* § 11 (1971). But it isn't as simple as locating the "roof

³⁵ *Matter of Phillips' Estate*, 4 Kan. App. 2d 256, 262, 604 P.2d 747, 753 (1980)

³⁶ *Peck*, pp. 464-65 (1991).

³⁷ At pp. 263-264

³⁸ The term domicile which in this case is synonymous with residence comes from a Latin term meaning "home." 25 Am. Jur. 2d Domicil § 1

over someone's head," considering it the person's home, and being satisfied legal domicile has been determined.

Determining one's subjective intent requires sifting through all the activities of a person's life.³⁹ At least theoretically, virtually everything a person is involved in might be relevant. At this stage of analysis, relevant are all those activities which have a nexus with the location of someone's "home." Some such activities are very determinative because they include some sort of requirement of the designation of one's residence. A particular activity by its nature may be regulated to only one location consistent with one's home such as voting and to a supposed degree, driver's licensure. Some activities speak to the location of one's residence because of ease and/or convenience of participation. Examples of this include church attendance, involvement in civic organizations, and choice of necessary services.

Circumstances can vary between individuals to such a degree that the value of evidence of these activities as objective proof of the person's subjective intent can be very different in each case. Consider the difference in determining domicile in the following 2 examples. The first is a person whose life can be fully summarized as still living in a house where born and raised, single, full-time employment, have no other nuclear family members, very little extended familial contact, and only one hobby, stamp collecting. That would be a stark contrast to our second example. This person owns three (counting a lake property) physical habitations suitable for living, interest in twenty some odd businesses, memberships in multiple groups that advocate entrepreneurship, an active role in the University they attended, attends church, is involved in significant philanthropic fund raising events that involving sports and entertainment personalities, has been involved in movie productions, has written, produced,

³⁹ Home is the place where a person dwells and which is the center of his domestic, social and civil life. *Restatement (Second) of Conflict of Laws* § 12 (1971)

directed, and starred in stage productions, has been a statewide candidate for political office, has a number of children and grandchildren, interest in hobbies which are inherently social like golf and tennis, maintains memberships in social (country) clubs, serves on either standing or *ad hoc* committees in nearly every organization or entity in which they are a member, is a military veteran and all of the other things which follow being a person of substantial success.

Another significant context is presented by the lack of evidence Gene had any plan to sell his largest and most prized company until receipt of the offer that precipitated its sale. There was substantial evidence presented which established and corroborated the fact that the sale of NPC⁴⁰ was something along the lines of a spontaneous reaction to an offer. The evidence established the agreement to sell NPC came as a great shock to all those people that were in Gene's inner circles of friends and business associates.

A person who attempts to create a false appearance of domicile purely for the purpose of avoiding tax liability must be viewed in a much different light than someone who legitimately changes their residence or domicile for the same reason. The evidence in this case is such that the court can make the specific affirmative finding that Gene, no matter what other findings may be made, was not attempting to create a false appearance of domicile purely for avoiding tax liability. Every domicile he chose was not a charade or merely for the purpose of appearance but was his actual intended domicile or legal residence. It is well within common knowledge and common sense to assume that a reasonably prudent business person who is about to sell a major asset will take those steps that a reasonable and

⁴⁰ NPC was the largest single Pizza Hut franchisee in the world. It began with Gene, then a young, married, college student who sold insurance for a living, literally scraping up enough money to purchase franchise rights for 2 Pizza Hut restaurants in the very early days those franchises were available. It is the sale of this company which precipitated most of the tax liability at issue in this matter.

prudent person would take in order to maximize recovery and the minimize things which reduce that recovery.

When all of the evidence is viewed in its totality it includes Gene's business habits, importantly the lack of attention to detail and his delegation of authority. Couple these with a lack of any preexisting plan to enter into a major financial transaction. The result provides more than adequate explanation to this court for some of the more specific actions or failures to take action by Gene during the relevant time period examined. Therefore, the court found some of Gene's statements and actions as having little or no weight in determining his subjective intent to establish Florida as his legal residence or domicile. The court's objective was to make ultimate conclusions based upon the evidence presented and the evaluation of the totality of the circumstances. The circumstances included Gene's character, normal business practices, and other relevant characteristics and circumstances. This was an effort to avoid looking at a particular act or statement out of context and imputing to that act or statement more significance than it deserved.

A final observation is offered as a summary of the court's approach to the determination of the general conclusions and findings. Although there are exceptions, such as the impact of residency on college tuition or the prospective ability to run for office, legal controversies over domicile are most often focused on a person's status at a point of time in the past. Therefore cases, like this one, consist of reconstructing history. "The trouble about cases of this type is, it becomes important for the person claiming a residence at a certain place, at a certain time, to substantiate that claim. Who can say in good faith that he did not intend to change his residence? Nobody knows, of course, what was in the mind of the party testifying."⁴¹ We should maintain an honest view of our limitations. We are, after all, with the

⁴¹ *State ex rel. Conderman v. Jones*, 169 Kan. 521, 526, 219 P.2d 706, 709 (1950)

self-proclaimed benefit of 20/20 hindsight, trying to determine what a person was actually thinking by evaluating what they said about or did relative to a legal concept to which they were most likely oblivious.

We should proceed with a requisite caution. Otherwise we come perilously close to an appearance the judicial process should always avoid; appearing to have left behind the realm of determining truth based upon fact to enter a farcical universe of self-righteous absurdity. We encounter that danger when we limit our view of history to a lens of imposed legal criteria irrelevant to the historical actor's conscious activity. That focus constantly risks attaching more significance to an event than reality would ever justify.

CATEGORIZED FINDINGS OF MORE SPECIFIED FACTS

Organization corresponds to K.A.R. 92-12-4a

The findings of fact which are more particularized compared to the preceding section are categorized in relationship to the sections and subsections of the relevant regulations with the intent of complying with the mandate of the Court of Appeals to “consider K.A.R. 92-12-4 and K.A.R. 92-12-4a along with controlling statutory law and caselaw...”⁴² The organizational structure is provided by the provisions of K.A.R. 92–12–4a which are relevant to the instant case.

The regulation, K.A.R. 92–12–4a became effective March 2006 presenting the potential issue of different regulations affecting different time periods. The previous regulation, K.A.R. 92–12–4 had only 3 sections and differed from its successor. The definition of domicile (Section 1) differed from its successor. Section (2), when compared to the newer regulation had a much more abbreviated recapitulation of the rules regarding change of domicile. The 3rd section was the older regulation's only express direction regarding factors that indicated domicile. It provided that evidence of domicile shall

⁴² *In re Bicknell*, 356 P.3d 437 (Kan. Ct. App. 2015)

include “voting residence”, the state where a driver’s license is issued, and the state where an individual’s vehicle is registered.

Both regulations are generally consistent with each other and with Kansas statutory and common law. The difference in definitions was a difference in emphasis not qualification. The “abbreviated” section (2) presents no real conflicts in application. The three factors which the previous regulation stated “shall” be considered as evidence are all factors which may be considered under the newer version. The mandate of the COA includes consideration of all appropriate statutory and case law. Provision for such consideration is included in (b)(7)(s) which allows any other appropriate consideration, a convenient opportunity for full compliance with the COA mandate. The list of factors that may be considered in determining domicile set forth in the regulation in subsections (b)(7)(A)-(S) represent a codification of a significant portion of Kansas case law. For the most part all the regulation’s provisions are in harmony with Kansas law.

The regulation used for our outline, K.A.R. 92-12-4a, is entitled “resident individual.” It establishes the definition of those persons who are subject to Kansas income tax by first making the terms “Kansas resident” synonymous with “resident individual” in Section (a). Section (b) defines the operative criteria of a resident individual as being that person’s domicile. Section (b) is divided into 8 subsections which set out the rules for the determination of domicile. The consistency between this regulation and Kansas common-law is quickly realized when one compares the regulation with the comments of The American Law Institute on the subject of domicile in the Restatement (Second) of Conflict of Laws (1971). This is an authority which has been cited often by our appellate courts and quoted at length in at least one instance.⁴³

⁴³ *Matter of Phillips' Estate*, 4 Kan. App. 2d 256 at pp. 262-4.

K.A.R. 92-12-4a(b)(7) lists factors that may be considered in determining whether a person's domicile is in this state for the tax years in question. No single factor is independently determinative. The 3 factors that "shall be considered as evidence" under K.A.R. 92-12-4 (the older version) overlap with the list set out in the later regulation. Wherever domicile may have existed there is no evidence of change and only evidence that it remained static throughout the two-year period in question. Separate evaluation of those factors relative to effective time periods of regulations is not necessary.

Some of the factors listed in the regulation are not applicable to the instant circumstance. This includes those in sub sections (D) the person's status as a student, (F) the classification of the person's employment as temporary or permanent, (K) the purchase of any resident fishing or hunting licenses by the person, (M) the fulfillment or failure to fulfill by the person of the tax obligations required of a Kansas resident, (O) the location of the jurisdiction from which any unemployment compensation benefits are received by the person, and (P) the location of any school that the person or the person's spouse attends and whether resident or nonresident tuition was charged, as well as the location of the school attended by any of the person's children who are in grades K–12.

Particularized Findings of Fact

K.A.R. 92-12-4a (b)(7)(A). The percentage of time that the person is physically present within the State of Kansas and the percentage of time that the person is physically present in each jurisdiction other than the State of Kansas;

The only reliable evidence regarding the amount of time Gene spent in any particular state comes from the recollections of those people directly involved in knowledge of Gene's whereabouts. This is limited to Gene's personal assistant, his wife, and to a lesser extent a second tier of people like his son, Cindy Morris, etc. KDOR has no evidence. This lack of specificity is the result of Gene's long-standing practices and there is no evidence of an attempt to purposefully conceal information. Based on other testimony indicating that there were no formal records ever kept by anyone who was intimately familiar

with Gene's locations throughout the year, the court is not satisfied that any estimates by anyone other than those who would have been contemporaneously familiar with Gene's whereabouts on a day-to-day basis are accurate or worthy of serious weight or consideration. Even Gene's own evidence from people who should have the best knowledge is inconsistent. This appears to be more of a function of not tracking the information at the time than it does any malicious or malevolent purpose.

Taking the evidence as a whole and considering all of those witnesses that the court found believable and credible a significant conclusion is clearly established without the necessity of any specific percentages assigned. During the subject time, frame Gene spent most of the time in one of three states Florida, Missouri, or Kansas. Of those three it is the court's conclusion from the contradictory and contested evidence that Kansas was by far and away the state with the least physical presence. Although it is most likely that there were significant periods of time where Gene spent more time in Missouri than in Florida, there is no evidence of any intent to establish a domicile in Missouri. Any time he spent there would have been, at best, a temporary location for the purpose of producing, directing and starring in his productions.

Gene's physical appearances in Kansas will be addressed further below. Although the following conclusion needs to be read in conjunction with those findings, the court is convinced that there was a sufficient severance of physical presence from Kansas so as to be consistent with an intent to establish a domicile elsewhere. Further, there was sufficient presence in Florida that combined with an intent to establish Florida as a domicile the factor of percentages of time spent in a particular state weighs in favor of Gene.

(B) The location of the person's domicile for prior years;

In 1990, Gene purchased residential property in Florida with the intent it would eventually be his residence. In 1999, Gene decided to make Florida his residence and domicile. Gene sought advice in establishing residency in Florida. He was advised that he needed to do five things in Florida to establish residency: (1) have a residence; (2) have an automobile; (3) have a driver's license; (4) have a bank account; and (5) vote. As early 2000 began Gene continued with actions consistent with being a resident domiciled in Florida. He opened and used a bank account and safety deposit box.

But somewhere later in 2000 circumstances began to change. Gene became concerned with the operations and or management of NPC. Gene decided to intervene and further understood that intervention could not be accomplished from Florida, requiring a return to Kansas. The evidence indicates that he appreciated the resultant legal implications regarding residency. This court is sufficiently persuaded that Gene's intent to be a Florida resident coincided with objective indicia of that intent such, that Florida was Gene's residence by the time he decided to effectuate a change back to Kansas in late 2000.

The following information is important for background regarding the next change in chosen domicile. NPC was a publicly traded company in the years preceding 2000. In that year, Gene orchestrated a move where he purchased the 35% of outstanding shares, made the company private and acquired 200 additional Pizza Hut restaurants. The closing of this was delayed by litigation and/or persons who use litigation for gain.⁴⁴ It all closed in 2001 or 2002.

⁴⁴ This is based exclusively on the testimony of Gene at trial. He stated there are persons who lie in wait for these sorts of business situations and then file frivolous lawsuits knowing they can settle them for substantial sums of money as it is better to settle and go forward than to attempt to win. Gene's demeanor during this testimony was one of exasperation which the court found important relative to the events that are soon to transpire in this chronology.

Although this is a bit out of chronological order, as concerns NPC, Gene was CEO until December 2004 and he remained chairman of the board until he sold NPC International in 2006. NPC's administrative headquarters have always been in Pittsburg, Kansas, and Gene negotiated a provision in the sale of NPC, discussed below, requiring the headquarters remain there.

Gene intended Kansas as his domicile by the close of 2000. On December 8, 2000, Mr. Bicknell acquired a Kansas Driver's License and registered to vote in Kansas. Gene filed his 2000 and 2001 tax returns as a Kansas resident.

In 2002, Gene turned 70. He experienced an unusual amount of introspection due to the relatively recent loss of a number of close relatives and some new health problems of his own. The veracity of this self-reflection requires specific discussion. On this topic and some others KDOR argues that Gene's story is well rehearsed. Admittedly, Gene has had to tell this story on numerous occasions over an extended period. Some of this repetition and any fault or blame does not lie with Gene. COTA rendered a decision requiring a remand and KDOR spent substantial time seeking a rehearing, then a review by the Supreme Court. Gene's demeanor in presenting this testimony, under the circumstances, seemed very sincere and believable. Although the court might question whether this introspection alone would have motivated a new choice and domicile, the court is convinced beyond any necessary doubt that the next monumental event solidified that bona fide intent.

Rita was diagnosed with breast cancer, required radical mastectomy, and she sought treatment and convalescence in Florida. The year 2003 is the bright line demarcation where Florida once again became the chosen domicile. Kansas had been the previous domicile for only a short period.

Gene and Rita spent the vast majority of time during the latter part of 2002 and all of 2003 in Florida while Rita underwent cancer treatment and recovery. After Rita's cancer diagnosis and

treatment, she engaged in very little actual legal representation despite remaining affiliated with the Phalen firm. Gene and Rita's physical absence from the house in Pittsburg, and from the community in general, began in 2002 and was realized by the end of 2003. That absence continued from that 2002-2003 time frame through the period under scrutiny.

By late 2005, NPC received a purchase inquiry from Merrill Lynch. NPC was not on the market and every witness who might have knowledge, when asked, stated Gene never indicated a desire to sell previously, did not expect him to sell to Merrill Lynch and when he did in fact agree to a sale, they were universally shocked. The negotiations for the NPC sale began in 2005 and concluded with the sale in May of 2006. It is worthy to note every document related to the sale of NPC which required a residential address for Gene listed his Florida address.

Excurses on credibility - absence from Pittsburg.

Gene's absence from Pittsburg was credibly described by witnesses in varying terms ranging from the use of durations (absent months at a time) through descriptions of apparent result (they moved or had moved to Florida). Some witnesses described their personal perspective and knowledge. Others suggested the knowledge of Bicknell's move to Florida as so pervasive as to constitute a matter of community awareness. None of these witnesses expressed awareness of any plan the Bicknells may have had to ever return to Kansas as a residence.

KDOR criticizes these witnesses as being close friends, business associates and/or family. The court, mindful of the possibility of bias, carefully observed the live witnesses who presented this testimony. Several things should be noted. First, and probably the most obvious, had these witnesses been anything other than close friends, family, and business associates, the argument would have been that their testimony could not be very compelling since they were not the most likely to be aware. The

most likely to have reliable knowledge and, importantly, memory dating back to the most relevant period would be none other than close friends, family and business associates.

Second, is this testimony inconsistent with the behavior or actions of Gene and Rita? In other words, is the external evidence corroborating or contradictory? Gene, and Rita for that matter, never claimed they were never present in Pittsburg. They never claimed they cut all ties to the community and interests Gene had invested much time and resources in. The external evidence of hiring a full-time house sitter tends to corroborate. Despite KDOR's obvious expenditure of considerable resource and effort, the department produced no witnesses who contradicted this testimony. In fact, the KDOR "star" witness for the concept of Kansas residency testified that Gene is a celebrity. If that's true and Gene continued to live in Pittsburg, it seems likely that in the last 10 years a witness would develop to testify this is a sham. It is prudent to resist total reliance on the absence of evidence for the proof of anything. Still, this is a deafening silence.

While it may enjoy a certain amount of comfort to merely suggest that this testimony was bias, rehearsed and the result of motives other than arriving at the truth if KDOR's aspersions are accurate such descriptions are woefully inadequate to describe the flaws which must also be present.

Many of the business associates, former business associates and friends are persons who have much at stake incompatible with any possibility of persecution for perjury. The group of Gene's contemporaries who testified represent people from our society that take these matters seriously. While it is possible one or two of these gentlemen would purposefully lie to a court to reach KDOR's suggested conclusion, it would necessitate the existence of a wide-ranging conspiracy coupled with an epidemic of disregard of the sanctity of the testimonial oath and criminal sanctions for its violation.

The discussion of this evidence being credible is even more critical than the parties argue to the court. Close friends, close business associates, and close family members not only know where a person in such a relationship to them lives but in a small community or a small community within a community know the community consensus as to whether one of their members has effectively moved out of town in much the same fashion they are aware of the community consensus regarding truth and veracity.

Under this factor, previous domicile, there are more in-depth issues to follow. As to the very generic concept it is true that Gene had a prior domicile, that being Kansas. It is then incumbent upon Gene to demonstrate that he had met the necessary criteria as established by his actions and statements to establish a domicile of his choosing. As stated above, the court is convinced by clear evidence that those criteria have been met thus this factor weighs heavily in Gene's favor once all the evidence is considered.

(C) The location at which the person votes or is registered to vote, except that casting an illegal vote shall not establish a domicile for income tax purposes;

On August 4, 1999, Gene registered to vote in Florida. On December 8, 2000, Mr. Bicknell acquired a Kansas Driver's License and registered to vote in Kansas. The last time Mr. Bicknell voted in Kansas was July 2002. Gene voted in three Florida elections in 2006. Gene voted in a special election held in Florida in 2007.

Under this factor it seems clear that Gene consistently registered to vote wherever he intended his domicile to be and with his registration having been reestablished in Florida in 2004 this factor weighs in his favor.

(E) The location of services performed by the person in the course of employment;

Gene testified he was made an offer to purchase one of the initial Pizza Hut franchise opportunities from the original founders of Pizza Hut for \$800. He scraped together enough money to

purchase two and opened his first in Pittsburg, Kansas. This operation grew into NPC international which at some point in time became the largest single Pizza Hut franchise in the world. NPC owned 800 Pizza Hut restaurants and employed approximately 22,000 people.

Gene was CEO of NPC International until December 2004, and he remained chairman of the board until he sold NPC International in 2006. NPC's administrative headquarters have always been in Pittsburg, Kansas. Gene negotiated a provision in the sale of NPC, discussed below requiring the headquarters remain there.

Another one of Gene's successful business ventures was Pitt Plastics. From the admitted exhibits it appears that Pitt Plastics made its locus of business during all relevant time periods in Pittsburg, Kansas. Gene was in management control. He relinquished his management responsibilities for Pitt Plastics in 2002.

Gene held, during the at least parts of the relevant time, a position with Mariner Management as an advisor. Mariner is in Overland Park, Kansas.

This factor looks to the location of services provided. There was testimony establishing that Gene would provide the services by teleconference from Florida, but the issue is not the location of the person but the services. This factor can be seen as weighing in favor of Kansas domicile. There are no such services located in Florida.

(G) Change in the person's living quarters;

This factor is vague in that it is not clear whether it relates to a person changing from one living quarter to another or it relates to changes in a particular living quarter. Despite this lack of clarity, there is evidence which might be considered as relevant to either interpretation. In September 2002, the Bicknells hired Joan Waters to be a live-in house keeper at the Kansas property. Ms. Waters' duties

included driving the Bicknells' Kansas vehicles at least once a week. Gene and Rita have never had a live-in house keeper in Florida to look after the property like they did in Kansas.

Before considering the testimony of Gene and Rita regarding Ms. Waters it should be noted that this evidence, on its face, supports the other evidence regarding Gene and Rita's absence from Pittsburg. It corroborates, to a lesser degree, the concept of abandonment of Kansas as a domicile. The contest over this latter concept centers around the fact that Gene and Rita do not have their home formally listed for sale in the traditional sense. The testimony the court finds believable and credible is that this home would attract an extraordinarily small market in its location and that the Bicknells wish to avoid pretenders who are snooping or sightseeing and not seriously interested or able to purchase the property. Apparently, there is some discussion about donating the property. Understandably under these circumstances KDOR argues that retention of this home indicates a failure to acquire Florida as a new domicile. There is no evidence, direct or circumstantial, that Gene and or Rita intend to ever re-occupy the Pittsburg property as their residence. The circumstances surrounding the property satisfy the court that those circumstances alone do not constitute proof of an intent to return.

Gene and Rita testified they hired someone to house-sit and to drive any automobiles on a schedule all because of their infrequent appearances at the Pittsburg property. It is logical that this would be because they were gone from Kansas for extended periods of time and they wanted someone to permanently live in the Kansas house and monitor its upkeep. It makes common sense that if vehicles sit idle for weeks at a time or longer, the batteries go dead. This evidence corroborates the testimony described above of the friends and family who formed the opinion that by no later than 2005 Gene and Rita no longer lived in Pittsburg, Kansas. It is important to note the hiring of this house sitter and that its timing is well before any knowledge of and offer to purchase NPC.

Ms. Waters came to the home in Florida to care for their dog while the Bicknells were away traveling. Other than babysitting the dog there is no evidence of anyone staying at the Florida property for any purpose related to Gene and Rita's absence.

This factor weighs in favor of Florida domicile.

(H) The person's ownership of other real property;

The Florida real estate includes a house with 5,870 sq. ft. and had an appraised value in 2006 of \$5,047,500. There is no specific evidence as to an exact value of the Pittsburg property, but it is very likely that the argument is accurate that the Florida home is not only much larger but is in the neighborhood of 10 times the value. One of the factors that's been recognized in other jurisdictions and is listed in the lengthy discussion in the Restatement (Second) of Conflict of Laws is the relative or compared values of properties.

KDOR seems to make much of the additional land and cattle operation owned by Gene and Rita. Frankly, in considering all the evidence it appears this is an enterprise in which Gene is, at most, nominally involved and absentee farm and ranch ownership is too commonplace for the mere ownership to be particularly significant.

This factor weighs slightly in favor of Florida domicile.

(I) The jurisdiction in which the person has been issued a valid driver's license;

On August 4, 1999, Gene surrendered his Kansas driver's license to the Florida Department of Motor Vehicles and obtained a Florida driver's license. On December 8, 2000, Mr. Bicknell acquired a Kansas Driver's License.

On January 7, 2003, Gene appeared at the Florida Department of Motor Vehicles, obtained a duplicate of the driver's license he had obtained in 1999, and surrendered his Kansas driver's license.

From January of 2003, the Florida license has been the driver's license Gene carries and considers his primary license.

In July of 2004, Gene personally appeared at the Driver's License Bureau Office in Pittsburg after receiving a renewal form in the mail. He was assisted by Lora Krum. This Bureau is a subdivision of KDOR. What specific representations were made, questions asked, and items discussed is highly contested.

It is uncontested that counsel for KDOR intimately familiar with the issues of this matter met privately with Ms. Krum prior to her recollections being memorialized or shared. Ms. Krum's demeanor and overall appearance seemed to include a preoccupation with the notoriety this encounter has since gained. Her memory was purportedly enhanced by a special attention she self-described as the systematized attentiveness she has developed and employs whenever she waits on a celebrity of great notoriety. She stated Gene Bicknell was one of these persons of renown. This is met with some skepticism. Is the Pittsburg, Kansas, DMV office a location where the appearance of superstars occurs in such frequency as to present the opportunity to develop a standard procedure?

There were many issues with this event including questions regarding the accuracy of the records maintained by the two states, the failure to catch the possible existence of Florida license, and the fact that at a subsequent traffic stop in Missouri, Gene produced the Florida license and drew no questions about it from the trooper. In summary, this entire event is determined by the court as having so little credit and weight on Gene's intent to make Florida his legal domicile as to matter little in light of the totality of the circumstances bearing on that issue.

The regulation list is a factor to be considered the jurisdiction from which a person has a valid driver's license. If Gene obtained an illegal Kansas driver's license it certainly would not count under

the language of this sub section. What is clear from the historical facts and circumstances is that whenever Gene intended to change residences he obtained a driver's license from that jurisdiction. A satisfactory answer was never offered as to why he obtained the Kansas license, but the evidence is corroborated that he didn't officially use it. On balance this factor either weighs equally and therefore is of no assistance or weighs slightly in favor of the Florida domicile based upon Gene's production of the Florida license at the subsequent traffic stop. In the absence of any evidence suggesting the Kansas driver's license was used for any official purpose and with the testimony of Lora Krum being suspicious at best, this factor cannot be seen as supporting Kansas domicile over Florida.

(J) The jurisdiction from which any motor vehicle registration was issued to the person and the actual physical location of the person's vehicle or vehicles;

By 1999, Gene had registered a 1996 Cadillac Deville in Florida. In March 2004, the Bicknells bought and registered a 2004 Mitsubishi Endeavor in Sarasota County, Florida. The vehicle was registered in Sarasota County, Florida, until September 2010. Gene purchased a 2003 Thunderbird on July 28, 2003, in Pittsburg, which remained at the Pittsburg property. Gene registered another Mitsubishi in Sarasota County, Florida, in January 2005 and it so remained registered in Florida until September 2007. In February 2007, the Gene registered a 2006 Mitsubishi Endeavor in the State of Florida which remained registered there until 2010.

Gene registered motor vehicles in both states. As concerns motor vehicle registration, the evidence certainly does not support this factor weighing in favor of Kansas domicile. An argument can be made that this factor is balanced such that it is not dispositive one way or another. When looking at the evidence as a whole, the repetitive registration of vehicles in Florida certainly does not detract from a bona fide intention of establishing Florida as a residence in the 2003 – 2004 timeframe.

(L) The filing by the person of a Kansas tax return, report, or application as a Kansas resident or a nonresident individual;

Gene filed his 2000 and 2001 tax returns as a Kansas resident. Gene declared himself as a Kansas non-resident on his 2003 tax return.

Gene listed his Florida home's address on he and Rita's 2004 federal 1040 tax form and state income tax forms for Alabama, California, Delaware, Georgia Iowa, Indiana, Kansas, Kentucky, Louisiana, Maryland, Missouri, Mississippi, Ohio, Oklahoma, Oregon, and South Carolina, and Florida Intangible Personal Property Tax form.

On all applicable 2004 Florida tax forms Gene listed himself as a resident and non-resident on all others including his Kansas taxes which were filed as a non-resident for tax year 2004. He paid a Florida Non-Tangibles tax he only owed as a Florida resident in that year as well.

In January 2006, Gene applied for the Florida Homestead Tax Exemption. Gene stated reason for not previously applying was that until neighbors made him aware of the exemption he had no knowledge about it.

To qualify for the exemption, the applicant must demonstrate that they own real property and that as owner they maintain on the property either (1) the permanent residence of the owner; or (2) the permanent residence of another legally or naturally dependent upon the owner.⁴⁵ Further, a person may not own more than one homestead even when that other homestead is located in another state.⁴⁶ To comply with the requirements for successful application for the homestead exemption Gene had to have produced a valid Florida driver's license, a valid Florida voter registration card, and proof that his vehicles were registered in Florida.

⁴⁵ *Garcia v. Andonie*, 101 So. 3d 339, 344 (Fla. 2012) interpreting Art. VII, § 6(a), Florida Constitution as amended in 1968.

⁴⁶ *Wells v. Haldeos*, 48 So. 3d 85, 85 (Fla. Dist. Ct. App. 2010).

In October 10, 2005, Gene and Rita filed their 2004 Kansas non-resident returns. Gene listed his Florida home's address on he and Rita's 2005 federal 1040 tax form and state income tax forms for Alabama, Delaware, Georgia Iowa, Kansas, Kentucky, Maryland, Missouri, Mississippi, Ohio, Oklahoma, and Florida Intangible Personal Property Tax form. On all applicable 2005 Florida tax forms Gene listed himself as a resident and non-resident on all others including his Kansas taxes which were filed as a non-resident for tax year 2005. He paid a Florida Non-Tangibles tax he only owed as a Florida resident in that year as well.

Gene paid Florida Intangible Personal Property Tax for 2006, a tax he did not owe unless he was a Florida resident. Just as in the preceding 2 years Gene's 2006 federal 1040 tax form and state income tax forms for Alabama, Arizona, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, and Utah, and Florida Intangible Personal Property Tax form all listed his address as Englewood, Florida. And as before he represented to each of these states, other than Florida, he was a non-resident of the state.

From 2003 forward, Gene was consistent in representing to all taxing authorities, including the state of Kansas, that he was a resident of Florida. This factor heavily weighs in favor of determining Florida as Gene's domicile. Gene filed his Kansas taxes as a non-resident for tax year 2007, 2008, and thereafter.

(N) The address where personal mail is received by that person and not subsequently forwarded;

In 1978, Mr. Bicknell hired Karen Badart as his executive and or personal assistant. Karen Badart served for many years in that capacity. Ms. Badart had an office at 100 N. Pine in Pittsburg, Kansas, from a point in time approximately beginning in 1991. As Gene's personal assistant her responsibilities included receiving mail, paying bills, sending birthday cards, buying gifts for people,

and other personal responsibilities. If anyone other than Gene was in charge of scheduling it would be her. During the relevant time for establishing the location of Gene's domicile in 2005 and 2006 there is no contravening evidence to the representation that Ms. Badart forwarded mail to Gene to his Florida address or to wherever he might be traveling, if in fact she elected to forward mail to him at all. In this specific context, Ms. Badart considered Florida Gene's residential address and locations such as Branson, Missouri, as places he traveled. Ms. Badart's office address was never considered by Gene or anyone working for him as anything other than Ms. Badart's address.

Based upon the evidence which the court finds to be most credible and worthy of weight if this factor is only considered in its strictest sense, there is no address where Gene received personal mail that was not forwarded. Although it would be speculation to think that Gene never picked up mail at this address without it being forwarded, it is just as speculative to presume this address has any bearing on domicile this by the unsupported arguments and innuendos made by KDOR.

(Q) The representations made to any insurance company concerning the person's residence and on which any insurance policies are issued;

Karen Badart handled the placement of insurance coverage for Gene. She handled renewal notices and paid insurance premiums. Representations, if any, are not probative.

(R) The location where the person, the person's spouse, or the person's minor children regularly participate in sporting events, group activities, or public performances;

At some point in the distant past Gene became a member of Crestwood Country Club in Pittsburg. That membership was maintained throughout all relevant times and continues through the time of trial. Enough people are authorized to utilize this account in the absence of Gene or Rita that the use data is of little assistance in determining residence of Gene.

In August 1999, the Gene and Rita became members of Mission Valley Country Club, Florida, and have remained members at that club. In 1999, the Gene and Rita became members of Englewood

Tennis Club in Englewood, Florida, and remained members until health issues eventually prevented playing tennis. Gene and Rita joined the Manasota Beach Club in Sarasota County, Florida, in 2003.

Country club membership is not particularly probative in this matter.

Gene wrote a stage production that began operation in Branson, Missouri, in 2004. He wrote, produced, directed and starred in the production taking enormous amounts of time. Despite spending weeks on end in Missouri, he never intended Missouri as a residence even though he was most likely physically present there more than any other state for prolonged periods of time beginning in 2004. There is no dispute that on occasion Gene attended meetings of businesses and entities such as Pittsburg State University after traveling there from Branson. On occasion he attended church in Pittsburg on Sundays, commuting to and from Branson. Nevertheless, KDOR's assertion that Gene maintained a residence in Kansas while he spent most of his time in Branson is simply not supported by credible evidence.

KDOR relies on the presumption that Gene's residence continued in Pittsburg and attempts to use evidence that, at best, supports visits to infer a lack of intent to abandon Kansas as a domicile. Nothing outweighs the credible testimony of Gene and his witnesses that supports Florida as the more reasonable and believable residency during the times Missouri commanded greater physical presence than did either Florida or Kansas.

(S) Any other fact relevant to the determination of that person's domicile;

The last subsection of the regulation the court has used as an outline is a "catch all" wherein any relevant factor may be considered, presumably consistent with Kansas common and statutory law. The original determination by COTA would have to have been based on factors which could be enumerated

under this subsection. This makes COTA's explanation analyzed by the Court of Appeals very perplexing.

According to the COA, COTA expressly admitted that it was "ignoring all presumptions contained in the current regulation."⁴⁷ From an accurate legal perspective there are two "presumptions" which, absent evidence to the contrary, apply to this case. They operate in favor of the ultimate decision reached by COTA. These presumptions are the presumption of the pre-existing domicile and the presumption regarding the resident state of the spouse. The only explanation for this enigmatic and somewhat bizarre statement must be that COTA chose to ignore all the **factors** which **may** determine residency or domicile (as opposed to "presumptions"). The factors aren't presumptions. But the confusion doesn't end so simply. COTA suggested they relied on other factors from Kansas common-law. As doing so would be following (b)(7)(S) of the regulation, it would seem strange they insist on ignoring the regulations.

The purpose served by pointing this out goes beyond what might be viewed as calling KDOR and its supposed regulatory agencies on the carpet. With all due respect, there can be little room for any conclusion other than that the COTA decision was purely result driven. With a BOTA summary decision, which merely repeats the COTA determination without analysis, it is difficult to view either one of these regulatory agencies as anything other than a rubberstamp of the KDOR. That may seem harsh, but the only logical alternative is that neither regulatory agency was or is aware of their own regulations.

This court was faced with the repetitive argument that its job was to merely determine whether the regulatory agency's decision was supported by sufficient evidence. This was throughout this

⁴⁷ *In re Bicknell*, 356 P.3d 437 (Kan. Ct. App. 2015)

proceeding KDOR's interpretation of what the legislature intended by *de novo* review. In the event this court is wrong regarding the legislative intent of the relevant statutes, the above and forgoing should be enough in terms of this court's conclusion regarding any other applicable standard under the Kansas judicial review of administrative acts parameters. With this court's findings of fact and what appears to be a failure of sufficient competent evidence to support the agency's conclusions, the result should be the same irrespective of any standard of review.

The evidence supports the following additional factors which are recognized or likely to be recognized under Kansas common-law regarding domicile in this case.

(i) Choice of Law on estate planning documents

“A person's declarations as to what he considers to be his home, residence or domicil are generally admissible as evidence of his attitude of mind. Such declarations are frequently contained in formal legal documents, as wills, deeds and affidavits.... Whatever the context, their accuracy may be suspect because of their self-serving nature, particularly when they are made to achieve some legal objective, as the avoidance of taxation or the securing of a divorce.”⁴⁸ In this case we have formal statements contained within a testamentary trust document made at a point in time prior to there being any motive other than the document's context.

In 1999, Mr. Bicknell established a Grantor Retained Annuity Trust in which he placed his stock for Pitt Plastics for the benefit of his children. In December 2003, Gene executed an Irrevocable Trust Agreement for the O. Gene Bicknell Investment Trust. The “Grantor Retained Annuity Trust” executed in 1999 contained a choice of law provision designating Kansas. The later instrument identified Gene as

⁴⁸ *Restatement (Second) of Conflict of Laws* 22 Spec. Note (1971)

being “of Englewood, Florida,” and specified that the document is to be construed “under the internal laws of the State of Florida.”

Two additional documents are also worthy of consideration although possibly less weight than the previous instrument. They were executed at a time where Gene was involved in the sale of NPC but prior to his knowledge that there was any dispute with the State of Kansas regarding his residency. On October 4, 2005, Gene executed an Irrevocable Exclusion Trust Agreement (the “2005 Trust Agreement”), which identifies him as being “of Sarasota [County], Florida,” and specifies that its interpretation and operation “shall be governed by the laws of the State of Florida.” On December 8, 2005, Gene executed a “First Amended and Restated Revocable Trust Agreement of O. Gene Bicknell” which identified his residence as “Sarasota, Florida” and containing a choice of law provision that stated the instrument “shall be governed by the law of the State of Florida.”

Of similar weight and consideration is a document executed July 19, 2006, whereby Gene granted his son Martin Bicknell and Mariner Wealth Advisors, L.L.C. a Special Durable Power of Attorney for Business, Investment, Legal and Financial Matters. It identified Gene’s address as that of his home in Florida.

In July 2007, Mr. Bicknell executed the Second Amended and Restated Revocable Trust Agreement in which he declared himself to be a Florida resident and that the trust would be governed by Florida law.

(ii) Various corporate filings and other business-related statements

The evidence establishes that Gene was an “ideas guy” style of entrepreneur with the additional skill of finding people that then could carry out his business visions. Apparently, he was not particularly enamored with details and his personal assistant, Ms. Badart, filled the role of attending to details and

technical compliance with rules and regulations. Not all of Gene's business ventures were successful. Apparently successful or not, there were entities formed which precipitated the need of corporate and/or other official filings with offices of Secretary of State (or their relative counterparts) in various states. Gene's personal assistant had her own assistant named Cindy Morris. Between the two they handled all the detail or minutia for compliance of the many business ventures that Gene started. As they were working for a boss who was likely to take vital business notes on a napkin or Post-it note, they employed practices such as using the office address for all the necessary filings to ensure that those entities would correspond directly with these ladies and to prevent losing any important mail or documents.

This evidence is credible and not significantly refuted. Under the facts and circumstances of this particular case, all of the filings and other documents that were prepared by these ladies on behalf of Gene really don't provide any serious evidence regarding Gene's actual domicile.

The question remains whether the actions of Ms. Badart and Ms. Morris should be imputed to Gene? Certainly there are circumstances where that might be appropriate, but this is not one of them. The court is convinced that none of the actions taken by either of these ladies was done for any illegitimate purpose or illegal reason.

Therefore, the court concludes that there is no legal or equitable reason these filings should be regarded as anything other than what the evidence suggests that they are, the products of two non-law trained assistants trying to keep track of business filings. They are not evidence of an intended domicile in Kansas. To suggest otherwise adds a necessary fiction to an already complicated picture.

(iii) Family holidays

Beginning in 2003, Gene and Rita made the Florida home the location of celebrating major holidays such as their wedding anniversary, Thanksgiving, Christmas, and New Year's. Kansas family and friends' Christmas were held the week before in Pittsburg.

(iv) Church Attendance

Gene and Rita are practicing Christians who regularly attend church. This kind of attendance is distinguished from those things excluded from consideration under sub section 8 of the applicable regulation. For many years Gene and Rita belonged to the First Baptist Church in Pittsburg, Kansas. Gene and Rita were not members of a Florida church during 2003 to 2006 and did not formally join a Florida church until 2012.

Although the evidence does suggest that Gene and Rita attended meetings and services, one would presume they were instrumental in this church's finances, therefore, such attendance, even for a Florida resident, would not be surprising. It is within the common knowledge and understanding of a Christian that a home church is a personal and intimate decision and the fact they were unable to locate a suitable substitute home church until 2012 certainly does not indicate they were not residents of Florida prior to 2012.

(v) Other Representations

In February 2006, Gene was interviewed by Helen Kelly for an article that appeared in the Mission Valley Country Club (Florida) newsletter. Ms. Kelly, a very elderly person, quoted Gene in the article she authored as stating he and Rita had been "residing in the winter on Manasota Key, Englewood." Ms. Kelly testified that Gene said it that way because that's what she wrote in her notes.

In 2006, Gene applied for and was issued a concealed firearm permit by the State of Utah. In his application, Mr. Bicknell provided 792 N. Manasota Key, Englewood, FL as his address. The permit bears Mr. Bicknell's Florida address.

The pertinent regulation in (b)(8) provides for the exclusion of certain evidence which may not be considered in the determination of domicile:

(8) The following factors shall not be considered in determining whether or not a person is domiciled in Kansas:

- (A) The location of any organization to which the person makes charitable contributions; and
- (B) the location of any charitable organization for which the person serves as a board member, committee member, or other volunteer.

Consistent with this regulation, the court excluded consideration of that evidence with which fell within the parameters of this exclusion. Frankly, even if the court took into consideration all the evidence regarding Pittsburg State and other charitable organizations, the decision would remain unaltered.

The pertinent regulation also includes presumption is consistent with Kansas common-law. Two of which apply to this matter.

K.A.R. 92-12-4a (b)(2) Only one domicile at any given time

Each person shall have only one domicile at any particular time. Once shown to exist, a domicile shall be presumed to continue until the contrary is shown. The absence of any intention to abandon an existing domicile shall be considered to be equivalent to the intention to retain the domicile.

K.A.R. 92-12-4a (b)(5) Spousal residence presumption

“...there shall be a presumption that the place where a person's family is domiciled is that person's domicile. The domicile of a person who is married shall be the same as the person's spouse unless there is affirmative evidence to the contrary, the husband and wife are legally separated, or the marriage has been dissolved.”

The evidence which the court believes overcomes these presumptions by clear and convincing proof is most efficiently presented as a single narrative.

Gene met Rita in Pittsburg in 1987. In 1992, Rita Bicknell began studies at Washburn University School of Law. On March 17, 1994, Gene and Rita married, the ceremony being held on Gene's Florida property. In 1995, Rita graduated from law school and joined the Phalen Law Firm in Pittsburg.

Rita did not become a Florida resident until 2008. Up to this point in time she intended to maintain Kansas residency to maintain her law license and to be able to maintain a more active role in Kansas politics than possible as a non-resident. Rita's domicile is irrelevant to the ultimate issues in the tax matter except as it relates to the location of Gene's domicile.

Whether Rita would pass a scrutiny as intense as the scrutiny of Gene's residence might seem immaterial but it is quite relevant. One thing is certain. Only Rita's desire would weigh in favor of Kansas. No other element of domicile has been sufficiently demonstrated by the evidence. This court is not convinced her domicile during the subject time was Kansas. The evidence suggests it was Florida.

Admittedly, she has not been the focus of this litigation. The regulation is not specific as to which spouse may control the other. Before the court assigns her spouse's domicile based upon hers there ought to be some degree of proof she maintained a Kansas residency. That doesn't exist to the degree necessary to impute it to her spouse. Based on the evidence before this court, considering the parties, their relationship and activities, if one spouse's residency creates a presumption as to the residency of the other, Gene's residency would create a presumption as to Rita's but not the other way around.

The general rule as stated by the Restatement (Second) of Conflict of Laws is that if the requisites of establishing a new domicile are met the motives for doing so are irrelevant and do not

prevent recognition of the person's intended domicile. The authors go so far as to say the motive can be criminal or sinful. Since other statements have been cited from this Restatement so often and with authority in the appellate courts of our state it is safe to presume we would follow these remarks in Kansas as well:

Acquisition of a domicil of choice in a given place requires legal capacity, physical presence within its confines and an intention to make that place one's home (see § 15). Provided that these requirements are met, **it is immaterial what motives led the person to go there. It makes no difference whether these motives** were good or bad or, more specifically, whether the move to the new location was for purposes of health, to accept a job, **to avoid taxation**, to secure a divorce, to bring suit in the federal courts or even to facilitate a life of sin or of crime.

On the other hand, a person's motives in going to a place do have an intimate bearing on his attitude of mind toward it. If he goes there to accept a lifetime employment, he almost certainly intends to make his home there. A contrary inference, however, might well be drawn if the change of abode was for purposes of health, to accept public office or a temporary job or to escape from creditors. The fact that the move was dictated by a desire to obtain some special advantage, as a divorce or the avoidance of taxes, may give rise to the inference that the person had no bona fide intention to change his home and that therefore no new domicil was acquired. *Restatement (Second) of Conflict of Laws* § 18 (1971) (emphasis supplied).

This analysis along with guidance from our own case law is helpful in analyzing the current situation. In the case of a person who is changing domiciles, taking up residence in a domicile of choice, once they have fulfilled all the necessary criteria in their chosen place to live, we don't go back and analyze motive for any reason.

In this matter the situation is complicated since the evidence establishes that Gene had resided in Pittsburg, Kansas, for many years. He then decided to take up residency in Florida. It is with great relief the court look upon this earlier situation as one that does not have to be answered. It appears he may have accomplished that. In any event, Gene, in 2000, makes Kansas his domicile of choice and effectively transfers his residency back to his original state. The court is convinced by clear evidence that Gene reversed that course in 2003. He had established himself through sufficient objective evidence

of his subjective desire that this transfer of domicile had certainly occurred before the end of 2004. This is not a case where the evidence is relatively equal therefore the result is found in the position of merely enjoying a presumption. Nor is it one of the unique cases where the evidence is equal allowing the persons stated desire to control.⁴⁹ The overwhelming evidence is that Gene through his actions established Florida as his domicile well before the tax years in question.

The case cited earlier⁵⁰, *Garlinghouse v. Mulvane*, has a lesson with valuable instruction for those of us involved in this matter. The issue in the case was whether Mulvane was a resident of the State of Kansas. It worked to the plaintiff's advantage if he was not. He had left the State of Kansas with his wife who was ill and being treated in Texas. The trial court ruled in favor of the plaintiff and the Supreme Court had the wisdom to realize, without any specific indication in the record apparently, that the trial judge simply didn't believe the defendant. What the court pointed out as problematic was the only evidence was provided by Mulvane. That's the reason for that somewhat enigmatic axiom quoted. You can disbelieve the testimony as to intent but find it true from other evidence. You might ask "How is it possible to not believe someone as to their intent of domicile yet other evidence compels a ruling its favor?" Mulvane testified he intended to return to Kansas. Even if the judge didn't believe him the evidence demonstrated such was the case.

If we really look at the evidence in the instant matter, we see a parallel. The vast majority of the evidence offered by KDOR, in its best light, tends to balance the scales on one or two factors but is nowhere close to tilting the overall balance in their favor even with the presumptions they enjoy. Both parties argue Gene registered cars in the state they want to be his domicile. Gene registered more

⁴⁹ It is where a person's significant contacts are closely divided between two or more states. Here, on occasion, the person's desires as to the location of his domicil may be permitted to tip the scales in favor of one state or the other (see Comment h and § 20, Comment c). *Restatement (Second) of Conflict of Laws* § 18 (1971)

⁵⁰ At page 25 and 26.

vehicles in Florida, apparently trading cars more often. That *might* indicate more vehicle usage in Florida, but we do not really know. That factor is a draw.

What we do know is he had someone who started his cars and drove them in Pittsburg, apparently because they were left for such long periods without use. Once all of the evidence is considered, this factor typical of KDOR's assertion, are evidence of Florida domicile provided they are not taken out of context.

There are two exceptions where the evidence in context supports KDOR's position. They are (1) the incident at the Driver's License Bureau in Pittsburg and (2) a sentence in an interview for a retirement community newsletter. For reasons previously explained, they alone do not outweigh the other evidence. KDOR, undoubtedly will argue the court has ignored others. That is simply not the case. The other evidence, in context with the evidence as a whole, just does not have the probative value KDOR contends. The overwhelming credible evidence with probative value suggests that Gene was in fact a resident of Florida, not Kansas, in 2005 and 2006. He was not a "resident individual" as that term is defined in the Kansas Income tax code during those two years.

IT IS BY THIS COURT CONSIDERED AND DECREED After *de novo* consideration, the Board of Tax Appeals Summary Decision dated October 2, 2017 is reversed;

FURTHER, THIS COURT DETERMINES O. Gene Bicknell was not a Kansas resident for Kansas income tax purposes in the years 2005 and 2006, but was in fact a resident and was domiciled in the State of Florida. Any determination by the Kansas Department of Revenue to the contrary is reversed and set aside;

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED, AND DECREED Petitioners are ordered discharged from any and all liabilities for Kansas income tax for 2005 and 2006; past due

taxes assessment interest, penalties and fees; and any other assessments inconsistent with this decision as the orders and determinations of the Board of Tax Appeals and Kansas Department of Revenue are reversed and held for not. Any bond or surety posted to secure the prosecution of this appeal shall be returned to the petitioners.

Richard M. Smith

Senior Judge assigned