

**FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA**

**In The Matter of a Proceeding
Under Article Four of the Family Court Act**

ADRIENNE PHILLIPSON,

Petitioner,

-against-

**OBJECTIONS TO ORDER
OF HEARING EXAMINER**

Family File #24467

Docket No. F-540-98/051

JOHN MURTARI,

Respondent.

NOTICE: Rebuttal to this objection must be made within thirteen (13) days of is receipt by filing such rebuttal with the this Court along with proof of service upon Objector

TO THE FAMILY COURT:

The undersigned objector respectfully shows that:

1. Objector is the Attorney for respondent in a petition filed with the Onondaga County Family Court on August 25, 2005
2. A Hearing was held on the petition January 19, 2006 before Hearing Examiner Davies on January 19, 2006.
3. An Order dated of the Hearing Examiner was filed and entered on January 31, 2006. (See Attached Exhibit "A"). The Order was received by mail.
4. By affidavit attached hereto and made a part hereof, objector sets forth specific objections to the findings of fact and conclusions of law made by the Hearing Examiner.
5. Notice has been given to the opposing party of this objection

DATED: _____ 2006.

FROM: CHARLES A. KELLER III., ESQ.
Attorney for Respondent
9416 Carousel Center Drive
Syracuse, New York, 13290
Phone: (315) 450-3846

Sworn to before me this _____

day of _____, 2006.

Notary Public

**FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA**

**In The Matter of a Proceeding
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Adrienne Phillipson,

Petitioner,

-against-

AFFIRMATION

Family File #24467

Docket No. F-540-98/051

JOHN MURTARI,

Respondent.

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

1. Charles A. Keller affirms that he is an attorney duly admitted to practice law in the State of New York and the Commonwealth of Massachusetts and is the attorney for the Respondent herein.
2. The Respondent, John Murtari resides at 34 Franklin Street, Lyons, New York, 14489.
3. The Respondent is the father of the child Domenic Murtari.
4. The Petitioner is the mother of the child Domenic Murtari.
5. Domenic Murtari, born February 11, 1993, is the subject of this Petition/Action and resides with Petitioner Phillipson in San Diego, California.
6. A Petition was filed on August 25, 2005 for violation and enforcement of a support order. (See Attached Exhibit "B").
7. On the second line of that petition, it is asserted that Respondent's "last known address" is in Baldwinsville, New York – within Onondaga County.

8. Respondent Murtari filed a *pro se* motion/request for a change of venue by letter. That letter clearly asserted that Mr. Murtari resides in Wayne County. (See Attached Exhibit “C”).
9. By Order dated October 4, 2005, Hearing Magistrate Davies denied Respondent’s request for change of venue. (See Attached Exhibit “D”).
10. Upon a review of the transcript of the proceedings dated October 4, 2005 (See Attached Exhibit “E”), the Hearing Examiner noted Mr. Murtari’s assertions that he lives in Wayne County and has not resided in Onondaga County for five years.
11. The only evidence presented by Petitioner in support of Respondent’s residency in Onondaga County were (a) a representation that a letter from Respondent was postmarked within Onondaga County, (b) assertions that Respondent engages in “activity” at the Federal Courthouse in Onondaga County, and (c) the existence of a web site that states that the Respondent goes to the Federal Courthouse
12. No envelope or postmark was offered or received into evidence.
13. Hearing Examiner Davies correctly stated that the venue statute revolves around residency, not employment.
14. Hearing Examiner Davies made no findings of fact other than Respondent is “postmarking from Baldwinsville although he puts down the Lyons address”.
15. There is mention of a web site, but no testimony or exhibit regarding the web site was offered or received into evidence regarding how the web site associates Respondent in any way with Onondaga County, other than that it contained information that the Respondent goes to the Federal Courthouse “a couple times a month”. (See Attached Exhibit “E” at 1).
16. No hearing was held. No testimony of any kind was received. No exhibits were offered or received into evidence. A mere review of papers does not constitute a hearing. (*In re Sabatino*, 59 AD2D 992 (3rd Dept, 1977)). Further, there was no notice to Respondent that the October 4, 2005 proceeding would be for the purposes of a hearing. Due Process would have allowed Respondent to appear and present evidence on his own behalf.
17. Respondent’s assertions of residency created an issue of fact. New York courts have long held that when submitted papers create a material issue of fact, it is error to determine such an issue without a hearing. (See, *In re Sabatino*, 59 AD2D 992 (3rd Dept, 1977); *Levine v Levy*, 29 AD2D 827 (4TH Dept. 1968).) Since no hearing was held to determine the issue, the issue of venue was improperly determined.

18. Had a hearing been held and the evidence mentioned at the October 4, 2005 conference been offered, the uncontroverted evidence, Respondent's letter, was that Mr. Murtari resides in Lyons, New York – Wayne County.
19. Had a hearing been held and a postmark from within Onondaga County been received, as well as testimony taken that Respondent visits the Federal Courthouse in Onondaga County been taken, it would not have been sufficient to establish residency and venue within Onondaga County.
20. On November 5, 2005, Respondent sent a notice to the Family Court objecting to the finding of venue. That objection was denied in a letter from Family Court Judge Bryan Hedges. (See Attached Exhibit "F").
21. On January 18, 2006, Affirmant Charles A. Keller III., Esq agreed to represent Respondent *pro bono* for the purposes of the Support Hearing.
22. On January 19, 2006, Affirmant requested leave to file a Motion to Reargue and Reconsider the issue of venue pursuant to CPLR §2221(d) and (e), by Order to Show Cause. (See Attached Exhibit "G").
23. The Hearing Examiner refused to review the papers or consider either the Order to Show Cause or the Motion to Reargue and Reconsider.
24. At the hearing of January 19, 2006, Petitioner Phillipson testified under oath that she has had knowledge of Respondent's Wayne County address and that she has been aware that he does not reside in Onondaga County.
25. This testimony is in direct conflict with her sworn Petition that Respondent's last known address is in Baldwinsville, New York (See Attached Exhibit "B" at line 2).
26. Clearly Petitioner's sworn statement regarding Respondent's residency in Onondaga County was a lie.
27. The Hearing Examiner found that Respondent has sufficient income to meet his support obligations. (See Attached Exhibit "A" at 3).
28. This finding was based on Respondent earning \$10.00/hr while two other employees of his corporation earn \$12.50 per hour. Even if Respondent were earning \$12.50/hr, there was no evidence that he would be capable of meeting the support obligations imposed upon him.
29. The Hearing Examiner based a finding of willfulness on the part of Respondent by noting that he "served a jail sentence for contempt of Court". It is far more likely that a person who has been incarcerated for failure to pay, yet continues to fail to pay, is lacking means and is not willfully seeking to escape their obligations.

WHEREFORE, the Respondent Objects with this Court to the findings of Venue and that Respondent willfully failed to obey the order of this Court and that the Respondent knowingly, consciously and voluntarily disregarded his obligation under a lawful court order.

STATE OF NEW YORK, COUNTY OF ONONDAGA

The undersigned is an attorney duly licensed to practice law in the State of New York and the Commonwealth of Massachusetts shows: That deponent is the attorney of record for the Respondent in the within proceeding; that deponent has read the foregoing moving papers and knows the contents thereof; that the same is true to the deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Charles A. Keller, III. Esq.
Attorney for Respondent

DATED: February 25, 2006

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COUNTY OF ONONDAGA**

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ADRIENNE PHILLIPSON,

Petitioner,

-against-

AFFIDAVIT OF SERVICE

Family File #24467

Docket No. F-540-98/051

JOHN MURTARI,

Respondent.

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

_____, being duly sworn, deposes and says:

That (s)he is over the age of eighteen years and is not a party to this action; that on the day of _____, 2006, (s)he served the within "Objection to an Order of Hearing Examiner" upon Maureen K. Walsh, Counsel for Petitioner by depositing a copy thereof in a post paid envelope addressed to her office located at 2 Clinton Square, The Atrium, Suite 215, Syracuse, New York 13202 in a Post Office Box regularly maintained by the United States Postal Service within the State of New York located on the 300 Block of South Warren Street, Syracuse, New York.

Charles A. Keller III., Esq.

Sworn to before me this _____

day of _____, 2006.
