

NO. CV 06 4008351S : SUPERIOR COURT
LEANDRO P. RIZZUTO : TAX SESSION
 : JUDICIAL DISTRICT OF
v. :
 : NEW BRITAIN
PAMELA LAW, COMMISSIONER :
OF REVENUE SERVICES : FEBRUARY 28, 2007

**MEMORANDUM OF DECISION ON
PLAINTIFF'S MOTION *IN LIMINE***

In this tax appeal for the years 1997 through 1999, the plaintiff, Leandro P. Rizzuto (Rizzuto), challenges the commissioner's deficiency assessments of income tax based upon Rizzuto being domiciled in Connecticut and moves *in limine* to require the court to set the applicable standard of proof on the issue of domicile for the forthcoming trial.

The plaintiff claims that the standard of proof at trial is the preponderance of the evidence standard. The commissioner disagrees and claims that the clear and convincing evidence standard must be applied at trial.¹ The plaintiff raises additional points including

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The "normal civil standard of proof" is by a fair preponderance of the evidence. Mallory v. Mallory, 207 Conn. 48, 53, 539 A.2d 995 (1988). However, where the standard of proof is raised to the level of clear and convincing evidence, the parties should know in advance what standard the trier of fact will use in deciding the issues of fact. See In re Juvenile Appeal

(1) in a domicile matter, once the plaintiff has shown he was not a resident of Connecticut, the burden shifts to the commissioner to prove that he was a Connecticut resident; and (2) the failure to shift the burden to the commissioner has an adverse effect on the plaintiff's constitutional right to travel.

“A standard of proof allocates the risk of error between the litigants and indicates the relative importance of the ultimate decision. . . . [T]he preponderance of the evidence standard indicates that the litigants should share equally the risk of error because the interests at stake have roughly equal societal importance. Proof by clear and convincing evidence is an intermediate standard generally used in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing, or when particularly important individual rights² are involved.” (Citations omitted; internal quotation marks omitted.) Cookson v. Cookson, 201 Conn. 229, 234, 514 A.2d 323 (1986).

There appears to be a split of authority on both the federal and state levels as to the burden of proof standard to use in change of domicile issues. As an example, in McCann v. George W. Newman Irrevocable Trust, 458 F.3d 281, 289 (3rd Cir. 2006), the court concluded that its decision was “consistent with the conclusion of the Court of Appeals for the First Circuit, which explicitly rejected the clear and convincing standard

(83-AB), 189 Conn. 58, 60 n.2, 454 A.2d 271 (1983).

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Important individual rights relating to domicile were discussed in Amen v. Commissioner, Superior Court, judicial district of New Britain, Docket No. CV 02 0515337 (April 14, 2005, Aronson, JTR) (“domicile is of no small moment . . . a higher degree of proof represented by the clear and convincing standard should be applied”).

as the appropriate standard for proving a change of domicile for purposes of diversity jurisdiction, and adopted the preponderance of the evidence standard.” The McCann court recognized that the “Court of Appeals for [the] Second Circuit provided no reasoning for application of the clear and convincing standard based on federal law.” *Id.*, 290.

However, the McCann court, *id.*, 289, discussed that the Second Circuit, in adopting the clear and convincing standard, relied upon New York law that a party asserting a change in domicile has the burden of proving such a change by clear and convincing evidence and cited to Katz v. Goodyear Tire & Robber Co., 737 F.2d 238, 243 (2d Cir. 1984). See also El-Tersli v. Commissioner of Taxation & Finance, 14 A.D.3d 808, 787 N.Y.S.2d 526 (3d Dep’t 2005) (“taxpayer bears the burden of proving a change of domicile by clear and convincing evidence”).

Turning to the preponderance of the evidence standard on the state level, the Rhode Island Supreme Court held in Deblois v. Clark, 764 A.2d 727, 731-32 (R.I. 2001), that domicile is established by the preponderance of the evidence standard of proof pursuant to the explicit statutory terms of Rhode Island General Laws § 8-8-28. Moreover, the Oregon Tax Court in DeFilippis v. Dept. of Revenue, TC-MD 050757C (2006), analyzed three factors in order to determine a change of domicile and stated that “Oregon law [ORS 305.427] places the burden of proof on Plaintiff to establish by a preponderance of the evidence that [the plaintiff] was not a resident of Oregon, domiciled in this state, for the tax years at issue.”

In Connecticut, there does not appear to be any statutory requirement that a particular standard of proof must be applied in tax cases. The leading case dealing with the issue of burden of proof in tax matters, Leonard v. Commissioner of Revenue Services, 264 Conn. 286, 302, 822 A.2d 1184 (2003), recites that “[i]t is well established that the burden of proving an error in a deficiency assessment is on the plaintiff” However, the plaintiff argues that certain language in Leonard, namely, that “[t]he plaintiff must present clear and convincing evidence that the assessment is incorrect or that the method of audit or amount of tax assessed was erroneous or unreasonable” is dictum and should not be relied upon by the court. (Internal quotation marks omitted.) *Id.*; see Plaintiff’s motion *in limine*, p. 3.

“Dictum is generally defined as [a]n expression in an opinion which is not necessary to support the decision reached by the court. . . . A statement in an opinion with respect to a matter which is not an issue necessary for decision. . . . [D]icta have no precedential value.” (Citation omitted; internal quotation marks omitted.) State v. Torres, 85 Conn. App. 303, 320, 858 A.2d 776 (2004).

Contrary to the plaintiff’s claim, the use of the clear and convincing evidence burden of proof by the Leonard court was not dictum but germane to the court’s decision. Leonard was decided in 2003. If, as the plaintiff claims, the issue of whether a heightened

standard of the burden of proof is a legislative prerogative, the legislature's failure to overturn the holding in Leonard suggests legislative approval.³

It should be noted that “[a]gency regulations, appropriately issued, have the force and effect of a statute. . . . [and should be construed] in accordance with accepted rules of statutory construction.” (Citations omitted.) Gianetti v. Norwalk Hospital, 211 Conn. 51, 60, 557 A.2d 1249 (1989). The commissioner further points out that pursuant to the Regulations of Connecticut State Agencies § 12-701(a)(1)-1(d)(2), “[t]he burden is upon an individual asserting a change of domicile to show that the necessary intention [to change domicile] existed.” (Defendant’s objection to plaintiff’s motion *in limine*, p.7.)

The plaintiff also claims that “[t]he constitutional right of interstate travel requires that the Court employ a burden shifting analysis in which the Commissioner will bear the ultimate burden of proof under the circumstances of this case. After Plaintiff makes a prima facie showing that he was not a resident of Connecticut in the subject years because [he] intended to be a Wyoming resident and did not spend more than 183 days in Connecticut, the Commissioner should bear the ultimate burden of proof on the issue of domicile.” (Plaintiff’s motion *in limine*, p. 13.)

The concept of the constitutional right to travel is a well-recognized right. See McEnerney v. United States Surgical Corp., 72 Conn. App. 611, 618, 805 A.2d 816

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See Conway v. Wilton, 238 Conn. 653, 678-79, 680 A.2d 242 (1996), for the concern about legislative inaction.

(2002). Reviewing the facts in the present case, the plaintiff appears to claim that his constitutional right to travel is impeded because the commissioner found that the plaintiff was domiciled in Connecticut, not Wyoming. There has been no indication that the plaintiff will be subject to multiple taxation or deprived of any governmental benefits and privileges by the commissioner's challenge of the plaintiff's place of domicile. As discussed above, the court relies on Leonard, 264 Conn. 302, that "[i]t is well established that the burden of proving an error in a deficiency assessment is on the plaintiff."

Accordingly, the proper standard of proof required in this action involving a change of domicile issue is by clear and convincing evidence. The plaintiff has the burden of proving that the commissioner was in error in her deficiency assessment against the plaintiff. Therefore, the plaintiff's motion *in limine* is denied.

Arnold W. Aronson
Judge Trial Referee