

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40532
Conference Calendar

DAVID PARDUE,

Plaintiff-Appellant,

versus

WANDA PARDUE,

Defendant-Appellee.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:93-CV-138
- - - - -
(September 20, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

"To proceed on appeal in forma pauperis, a litigant must be economically eligible, and his appeal must not be frivolous." Jackson v. Dallas Police Dept., 811 F.2d 260, 261 (5th Cir. 1986). The district courts have original diversity jurisdiction over civil actions between citizens of different states in which the amount in controversy exceeds the sum of \$50,000, exclusive of interest and costs. 28 U.S.C. § 1332(a)(1). Individuals are citizens of their state of domicile. Mas v. Perry, 489 F.2d

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

1396, 1399 (5th Cir.), cert. denied, 419 U.S. 842 (1974).

Ordinarily, courts presume that "[a] prisoner does not acquire a new domicile in the place of his imprisonment, but retains the domicile he had prior to incarceration." Polakoff v. Henderson, 370 F. Supp. 690, 693 (N.D. Ga. 1973), aff'd, 488 F.2d 977 (5th Cir. 1974) (adopting district court's reasoning).

Residence in fact, and the intention of making the place of residence one's home, are essential elements of domicile. Words may be evidence of a man's intention to establish his domicile at a particular place of residence, but they cannot supply the fact of his domicile there. In such circumstances, the actual fact of residence and a real intention of remaining there, as disclosed by his entire course of conduct, are the controlling factors in ascertaining his domicile.

Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954); see Freeman v. Northwest Acceptance Corp., 754 F.2d 553, 555-56 (5th Cir. 1985) (statements of intent entitled to little weight when in conflict with the facts). The district court found that David Pardue's course of conduct did not indicate that he intended to change his domicile to Texas. This fact-finding was not clearly erroneous. See Fed. R. Civ. P. 52(a).

Pardue moved for leave to amend his complaint to drop his action against the non-diverse defendant, Wanda Pardue. Even without the non-diverse party, however, the district court concluded that suit was filed in the wrong district because no party resided in the Eastern District of Texas. See 28 U.S.C. § 1391. Under 28 U.S.C. § 1406(a), the district court was entitled to dismiss the case or to transfer it to a court of proper venue if to do so would have promoted the interest of

justice. Although Pardue suggests that a transfer of venue would promote judicial economy, he does not suggest that the district court abused its discretion by dismissing the action without prejudice.

Pardue's motion for leave to appeal in forma pauperis is DENIED. The appeal lacks arguable merit and is, therefore, frivolous. Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it is DISMISSED. See 5th Cir. R. 42.2.